

# Annual Survey of Massachusetts Law

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Volume 1974

Article 21

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1-1-1974

## Chapter 18: Environmental Law

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### Recommended Citation

O'Brien, John J. and Miller, Jeffrey G. (1974) "Chapter 18: Environmental Law," *Annual Survey of Massachusetts Law*: Vol. 1974, Article 21.

C H A P T E R 18

# Environmental Law

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**§18.1. Introduction.** The 1974 Survey year saw significant developments occur in the environmental law area. The legislature, the courts, and administrative agencies all continued to develop policies under the Massachusetts Environmental Policy Act (MEPA);<sup>1</sup> specialized land use plans were set up to protect the natural resources of Martha's Vineyard, wetlands areas, and the Berkshire Mountains; and important developments in the national air pollution control program began to be implemented in the Commonwealth. This chapter will focus on developments related to MEPA,<sup>2</sup> land use regulation,<sup>3</sup> miscellaneous developments at the state level,<sup>4</sup> and the effect of federal air pollution control activity.<sup>5</sup>

## A. MASSACHUSETTS ENVIRONMENTAL IMPACT REVIEW

**§18.2. MEPA: Introduction.** The Massachusetts Environmental Policy Act (MEPA),<sup>1</sup> enacted by the legislature in 1972,<sup>2</sup> mandates for

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This article was written by the authors in their private capacities. No official support or endorsement by the Environmental Protection Agency, the Division of Water Pollution Control, or any other agency of the state or federal government is intended or should be inferred.

§18.1. <sup>1</sup> G.L. c. 30, §§ 61, 62, as amended.

<sup>2</sup> See §§ 18.2-6 *infra*.

<sup>3</sup> See §§ 18.7-10 *infra*.

<sup>4</sup> See § 18.11 *infra*.

<sup>5</sup> See §§ 18.12-17 *infra*.

§18.2. <sup>1</sup> G.L. c. 30, §§ 61, 62, as amended. MEPA is reviewed generally within the context of its federal counterpart, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-47 (1970), in Miller, *Environmental Law*, 1972 Ann. Surv. Mass. Law §§ 21.8-10, at 629-37.

<sup>2</sup> Acts of 1972, c. 781, §§ 2, 3.

the Massachusetts state government an environmental review process similar to that imposed upon the federal bureaucracy by the National Environmental Policy Act (NEPA).<sup>3</sup> From its inception, MEPA's two-step environmental review requirements have been a source of some controversy.<sup>4</sup> Yet, prior to the 1974 Survey year the only major development<sup>5</sup> since its enactment had been the promulgation by the Secretary of Environmental Affairs of "Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports" (hereinafter the State Project Guidelines)<sup>6</sup> which were intended to facilitate the early implementation of MEPA.<sup>7</sup> During the 1974 Survey year, however, the administration of the MEPA environmental review program has been made much more complex as a result of the interaction of several legislative, judicial, and administrative developments which variously affect the scope and enforceability of MEPA, the nature of state agency obligations thereunder, and the procedures by which MEPA impact reports are to be prepared.

Although no authoritative evaluation had been made of the effect of MEPA, the legislature apparently was persuaded that it was economically and administratively unwise to require the same degree of environmental review for activities in which a state agency was a direct participant as for those activities in which state agency involvement arose more indirectly, such as through a permitting or licensing

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<sup>3</sup> 42 U.S.C. §§ 4321-47 (1970).

<sup>4</sup> MEPA requires, first, that state agencies incorporate into the planning of all their "works, projects or activities" a consideration of the environmental consequences of those actions, G.L. c. 30, § 61, and, second, that they prepare an "environmental impact report" for any such action which may cause "damage to the environment," *id.* § 62. For the Act's definition of "damage to the environment" see §18.3 n.1 *infra*.

<sup>5</sup> Although the promulgation of the State Project Guidelines, see note 6 *infra*, was undoubtedly the major MEPA development to take place during the previous Survey year, a number of other events occurred. As part of the major revisions of the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53, to bring that statute into conformance with the requirements of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), codified at 33 U.S.C. §§ 1251-1376 (Supp. II, 1972), the Division of Water Pollution Control was exempted from MEPA environmental impact review obligations in activities relating to the construction of publicly-owned treatment plants and to projects in which an environmental impact statement was required under federal law. Acts of 1973, c. 546, § 16. See §18.6 n.5 and accompanying text. Other developments, such as the several court actions discussed in §18.5 *infra*, although initiated prior to the 1974 Survey year, were concluded during this Survey year.

<sup>6</sup> These Guidelines, initially filed on June 29, 1973, and published on July 6, 1973, were later amended on Oct. 31, 1973 by "Amendments to Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports." As this chapter was going to press, the Secretary of Environmental Affairs was taking steps to refine these Guidelines. See §18.6 n.10 *infra* and accompanying text.

<sup>7</sup> MEPA requires that each of the cabinet offices promulgate rules and regulations to implement its environmental impact report program. G.L. c. 30, § 62. See § 18.4 *infra*.

function. With this in mind, MEPA was amended to provide a different scale of environmental review for *public*, as opposed to *private*, projects.<sup>8</sup> Other amendments attempted to impose limitations upon the length of time within which judicial challenges to MEPA reports and findings may be initiated<sup>9</sup> and exempted the Emergency Finance Board from some applications of MEPA.<sup>10</sup> These legislative developments were accompanied by the promulgation of a series of regulations, filed by most of the executive offices, designed to create for their constituent state agencies standardized procedures for satisfying MEPA's requirements. To varying degrees, these regulations expand upon the broad outlines of the two sets of guideline regulations promulgated by the Secretary of Environmental Affairs<sup>11</sup> and facilitate an administrative regime that recognizes the newly-legislated distinction between public and private project impact reports. Finally, during this period the judiciary was presented with several questions concerning the scope and enforceability of MEPA.

The following four sections will attempt to identify and explore the dominant themes that emerge from these developments. The statutory modification regarding *private* project impact reports and the administrative procedures that have been developed to facilitate the preparation of this new breed of report are discussed in §18.3 *infra*. The salient aspects of the various executive office MEPA regulations and their place within the overall context of the MEPA review process are discussed in §18.4 *infra*. The statute of limitations for challenging MEPA actions and the limited case law that has developed on the enforceability of the statute are discussed in §18.5 *infra*. Finally, §18.6 *infra* concludes this review of 1974 Survey year MEPA developments with some retrospective and prospective observations as to the efficacy of the Massachusetts environmental impact review process.

**§18.3. MEPA amended: Private projects and state projects: Limited reports and subject-matter jurisdiction.** MEPA as originally enacted made no distinction either as to the range of activities subject to, or the scope of analysis imposed by, its environmental impact review requirements. These requirements were to be uniformly applied: state agencies, authorities of the Commonwealth and authorities of political subdivisions (state agencies) were required to prepare an en-

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<sup>8</sup> Acts of 1974, c. 257, § 1, amending G.L. c. 30, § 62. See § 18.3 *infra*. Note that projects undertaken without *any* involvement by a state agency or by an authority of a municipality continue to remain exempt from MEPA.

<sup>9</sup> Acts of 1974, c. 257, § 2, amending G.L. c. 30, § 62. See §18.5 *infra*.

<sup>10</sup> Acts of 1974, c. 819. See §18.6 n.6 *infra* & accompanying text.

<sup>11</sup> The second set of Guideline regulations are the "Regulations to Implement c. 30, s. 62, as amended by C. 257 of the Acts of 1974." See § 18.3 n.6 *infra* & accompanying text. As this chapter was going to press, these Guidelines were being refined by the Secretary of Environmental Affairs. See § 18.6 n.10 *infra* & accompanying text.

vironmental impact report for their works, projects or activities that were a potential source of "damage to the environment."<sup>1</sup> The State Project Guidelines were promulgated to translate the broad statutory objectives into a uniform format for the preparation of *all* MEPA impact reports. As a result of section 1 of chapter 257 of the Acts of 1974, however, the environmental impact report requirements of chapter 30, section 62 of the General Laws have been substantially modified. Now, the scope of impact analysis required of state agency MEPA reports will depend upon the nature of the state agency's involvement in the project in question. Where an agency's participation in a project involves the expenditure of state funds (a state agency project),<sup>2</sup> that state agency must prepare an impact report evaluating the broadest possible range of environmental issues, including issues not specifically a part of that agency's statutory mandate.<sup>3</sup> In this respect MEPA remains unchanged. But, on the other hand, where a state agency's involvement in an essentially private activity arises less directly, as through a licensing or regulatory function, and does not involve the expenditure of state funds, the scope of impact analysis for that project (a private project)<sup>4</sup> need not be as comprehensive as reports required for state agency projects: state agencies preparing private project impact reports must now assess the environmental impact of the proposed project only to the extent of their "subject-matter jurisdiction."<sup>5</sup>

Because he determined that the review procedure outlined by the State Project Guidelines would not be adequate to provide for the type of environmental review now required by MEPA, the Secretary of Environmental Affairs promulgated a second set of regulations for conducting the limited environmental review and analysis now required of private projects. The "Regulations to Implement C. 30, s.

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§18.3. <sup>1</sup> As defined in MEPA, "damage to the environment" is:

[A]ny destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth and shall include but not be limited to air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other surface or subsurface water resources; destruction of seashores, dunes, marine resources, underwater archaeological resources, wetlands, open spaces, natural areas, parks, or historic districts or sites. Damage to the environment shall not be construed to include any insignificant damage to or impairment of such resources.

G.L. c. 30, § 61. A similar definition is found in G.L. c. 214, § 7A, which deals with the equity jurisdiction of the Massachusetts courts.

<sup>2</sup> See notes 11-14 *infra* and accompanying text.

<sup>3</sup> See State Project Guidelines § 6.1. For a discussion of the scope of analysis required under NEPA, see Anderson, *The National Environmental Policy Act*, in *Federal Environmental Law* (Environ. Law Inst. 1974); Yarrington, *The National Environmental Policy Act 26-30* (BNA Environment Rep. Monograph No. 17, 1974).

<sup>4</sup> See notes 11-14 *infra* and accompanying text.

<sup>5</sup> G.L. c. 30, § 62, as amended by Acts of 1974, c. 257, § 1.

62, as amended by C. 257 of the Acts of 1974" (the Private Project Guidelines),<sup>6</sup> are to complement the State Project Guidelines; they detail the procedures to be followed in determining what activities are private projects,<sup>7</sup> what private projects might cause damage to the environment and thus require the preparation of an impact report,<sup>8</sup> and how private project impact reports are to be prepared.<sup>9</sup> The State Project Guidelines, meanwhile, will now outline the procedures to be followed in the environmental review of state projects.<sup>10</sup> Taken in concert, these two sets of regulations outline all review procedures governing state agency compliance with MEPA.

As expressed in MEPA, the private projects which are to be the subject of limited environmental review are to be those activities "for which no funds of the commonwealth are to be expended."<sup>11</sup> The statute does not provide any examples of what activities will or will not fall within the range of this limitation. In the Private Project Guidelines, the Secretary of Environmental Affairs has attempted to provide such a definition by enumerating a number of state agency regulatory and licensing functions in which the Commonwealth does not have a proprietary interest.<sup>12</sup> Activities falling within the scope of this definition will be assessed and reviewed according to the Private Project Guideline procedures discussed below. Conversely, actions not falling within this definition, such as those directly undertaken<sup>13</sup> or supported by financial assistance provided by<sup>14</sup> a state agency are considered state projects and are to be assessed and reviewed pursuant to the procedures detailed in the State Project Guidelines. In most cases it should not be difficult to determine which set of Guidelines is applicable to a given state agency activity. However, this determination may be more difficult in instances in which funds of the Commonwealth are expended indirectly, as when a state agency provides sig-

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<sup>6</sup> These Private Project Guidelines were filed on July 2, 1974 and published on July 12, 1974.

<sup>7</sup> See notes 11-14 *infra* and accompanying text.

<sup>8</sup> See notes 15-24 *infra* and accompanying text.

<sup>9</sup> See notes 25-32 *infra* and accompanying text.

<sup>10</sup> See text at notes 13-14 *infra*.

<sup>11</sup> G.L. c. 30, § 62, as amended by Acts of 1974, c. 257, § 1.

<sup>12</sup> The Private Project Guidelines key upon the operative term "permit," which is defined in § 3.1 of those regulations as:

[A]ny permit determination, order or other action, including the issuance of a lease, license, permit, certificate, variance, approval or other entitlement for use, granted or to be granted to any private person, firm or corporation, including trusts, voluntary associations or other forms of business organizations, by an agency for a project for which no funds of the commonwealth are to be expended. For these purposes, funds of the commonwealth shall be deemed to be expended if the project receives any form of financial assistance from any agency.

<sup>13</sup> State Project Guidelines § 2.4(a).

<sup>14</sup> *Id.* § 2.4(b).

nificant personnel or technical services. Unless it is to be sited in an “environmentally sensitive area” or an “area of critical environmental concern”<sup>15</sup> or is part of a series of projects the cumulative effect of which is “significant,”<sup>16</sup> a project need not be processed under either the Private Project Guidelines or the State Project Guidelines, as the case may be, if it falls within one of the categorical exemptions defined within the state project regulations promulgated by the appropriate executive office.<sup>17</sup> Activities of private parties which involve neither direct nor indirect state agency participation continue to remain unaffected by MEPA.

Consistent with the MEPA requirement that state agencies prepare an impact report *prior* to undertaking any action which may cause damage to the environment,<sup>18</sup> the Private Project Guidelines require that state agencies complete all environmental reviews before issuing their authorization of the private action.<sup>19</sup> The environmental review procedures outlined by the Private Project Guidelines utilize a two-step process similar to that required by the State Project Guidelines: an initial environmental assessment and, in instances in which the assessment indicates that the project may cause damage to the environment, the preparation of an environmental impact report. For the first step, the initial assessment, state agencies must evaluate proposed private projects in terms of the significance of the environmental impacts which may be caused thereby.<sup>20</sup> The Private Project Guidelines require that state agencies evidence the results of this evaluation by the preparation of a document termed a “limited environmental assessment form” (LEAF).<sup>21</sup> Unlike the environmental assessment form (EAF) prepared in the review of state projects,<sup>22</sup> the LEAF does not require that the state agency evaluation address any specific questions regarding possible environmental impact,<sup>23</sup> but instead merely re-

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<sup>15</sup> Id. § 8.3.

<sup>16</sup> Id. § 8.4.

<sup>17</sup> These categorical exemptions are enumerated in §8 of the State Project Guidelines. Section 4.1 of the Private Project Guidelines exempts any private project from the necessity of going through the review procedures of the Private Project Guidelines if such project falls within a §8 exemption.

<sup>18</sup> “No [state agency] shall commence any work, project or activity which may cause damage to the environment until sixty days after it has published a final environmental impact report . . . .” G.L. c. 30, § 62.

<sup>19</sup> Private Project Guidelines § 4.1.

<sup>20</sup> Id.

<sup>21</sup> Id. The LEAF is Appendix A of the Private Project Guidelines. To differentiate between the scope of analysis required of state and private project impact reports, the documents prepared pursuant to the Private Project Guidelines, and executive office regulations promulgated thereunder, carry the special designation “limited.” Private Project Guidelines § 3.2.

<sup>22</sup> State Project Guidelines § 3.

<sup>23</sup> The EAF requires that a proposed activity be assessed in terms of its long-term and short-term impacts upon a wide variety of environmental assets: the use of

quires that the agency indicate in summary whether or not an environmental impact report will be prepared for the project.<sup>24</sup> Irrespective of whether or not a LEAF indicates that a particular private project will cause environmental damage sufficient to warrant the preparation of an impact report, the LEAF, like EAFs, must be circulated for review among designated “reviewing agencies” and the public.<sup>25</sup>

Where it appears that a private project is likely to cause significant environmental damage, the Private Project Guidelines require that a limited environmental impact report be prepared.<sup>26</sup> Private project reports are to be prepared and reviewed according to the format outlined by the State Project Guidelines,<sup>27</sup> but are to be “limited in scope to the subject matter jurisdiction” of the preparing agency.<sup>28</sup> Although it is not entirely clear how the legislature intended that this limitation lessen agency review obligations, the Secretary of Environmental Affairs has interpreted the limitation to mean that in preparing limited impact reports, state agencies are to “fully consider the environmental impact of that *part* of the [private] project which is within the jurisdiction of the general or special laws or regulations providing for” the state agency’s involvement in the private project.<sup>29</sup> Within the context of this limitation, state agencies are to “review, evaluate, and determine the impact on the natural environment” of private projects.<sup>30</sup> The environmental review of private projects will adhere to the textual format prescribed by the State Project Guidelines,<sup>31</sup> but may require some modifications of that format where the environmental review might otherwise extend to areas beyond the subject-matter jurisdiction of the preparing agency. To

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recreationally- or aesthetically-valuable areas; unique natural or man-made features; historical or archeological structures or sites; the potential use, extraction or conservation of scarce natural resources; the habitats, food sources, or other areas vital to rare or endangered species; fish, wildlife or plant life; rare or endangered plant species; existing fresh or salt waters or wetlands; beaches; agricultural land; environmentally-productive statutory or regulatory programs; flood plains; noise, dust, and smoke levels; air and water resources; or scenic areas. See State Project Guidelines, Appendix A, “Environmental Assessment Form,” Part II (Assessment of Environmental Damage).

<sup>24</sup> The LEAF also requires that the preparing agency describe the project and its location, and identify all agencies involved as well as the degree of their involvement.

<sup>25</sup> The Guidelines mandate a number of time periods during which further progress on the project halts pending comments by reviewing agencies, the public, and the Secretary of Environmental Affairs. State Project Guidelines §§ 3.1(a), 3.2(b), 3.2(c), 7.2-4, 7.7, 7.9, 7.10, 9A. See Private Project Guidelines § 4.3. See also O’Brien & Deland, *Environmental Law*, 1973 Ann. Surv. Mass. Law § 6.8 n.16 & accompanying text, at 182-83.

<sup>26</sup> Private Project Guidelines § 5.

<sup>27</sup> Id. § 6.

<sup>28</sup> G.L. c. 30, § 62, as amended by Acts of 1974, c. 257, § 1.

<sup>29</sup> Private Project Guidelines § 5 (emphasis added).

<sup>30</sup> G.L. c. 30, § 61.

<sup>31</sup> Private Project Guidelines § 6.



facilitate the identification of state agency subject-matter jurisdiction, the Private Project Guidelines suggest that the various executive offices prepare and submit to the Secretary of Environmental Affairs for approval "scope of report" statements describing the subject-matter jurisdiction exercised with respect to the various private project activities of each of their constituent state agencies.<sup>32</sup>

**§18.4. MEPA: Executive office regulations.** MEPA contemplates that the implementation of the environmental review process which it mandates shall be directed, for the most part, by a system of rules and regulations promulgated by each executive office of the Commonwealth.<sup>1</sup> To facilitate this, the Secretary of Environmental Affairs promulgated guideline regulations<sup>2</sup> to serve both as models for the MEPA regulations to be promulgated by each executive office and as interim MEPA procedures to be used by state agencies until MEPA regulations have been adopted by the appropriate executive office.<sup>3</sup> During the 1974 Survey year MEPA regulations were adopted, and in some cases revised, by six of the ten executive offices: Communities and Development, Consumer Affairs, Educational Affairs, Human Services, Public Safety, and Transportation and Construction. Together, these regulations encompass most of the procedures governing state agency compliance with MEPA.<sup>4</sup> Taken in the aggregate, these executive office MEPA regulations form a curious regulatory scheme, perpetually in a state of flux, and grounded in a wide variety of enabling statutes, in MEPA, and in the Guideline regulations.

The various executive offices have not been uniform in their response to the changes in MEPA and to the Guideline regulations. Because of idiosyncracies inherent in state administrative processes, the executive office MEPA regulations were in varied stages of development when, one year after the MEPA environmental impact report requirement first became effective,<sup>5</sup> the legislature modified MEPA to

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<sup>32</sup> *Id.* § 5.1.

§18.4. <sup>1</sup> "The secretaries of the executive offices shall each promulgate rules and regulations approved by the secretary of environmental affairs to carry out the purposes of this section which shall be applicable to all agencies, departments, boards, commissions, authorities or instrumentalities within each of such executive offices . . . ." G.L. c. 30, § 62. See note 4 *infra*.

<sup>2</sup> These Guideline regulations are discussed in § 18.3 *supra*.

<sup>3</sup> State Project Guidelines § 1.2; Private Project Guidelines § 2.

<sup>4</sup> Although MEPA plainly states that the various executive offices are to promulgate rules and regulations specifying how their constituent agencies are to comply with MEPA, it does not indicate who is to be responsible for promulgating the MEPA procedures to be followed by those state agencies not specifically included within a given executive office. G.L. c. 30, § 62. See note 1 *supra*.

<sup>5</sup> By the provisions of Acts of 1972, c. 781, § 3, section 62 of chapter 30 of the General Laws took effect on July 1, 1973.

provide for the limited private project review.<sup>6</sup> By the time the new private project requirement and its implementing procedures became effective,<sup>7</sup> the Executive Offices of Consumer Affairs,<sup>8</sup> Educational Affairs,<sup>9</sup> Human Services,<sup>10</sup> Public Safety,<sup>11</sup> and Transportation and Construction<sup>12</sup> had promulgated MEPA procedures based generally upon the State Project Guidelines. But, within a month and a half of this date, one of these offices, Consumer Affairs, had augmented its MEPA procedures by prescribing general private project regulations.<sup>13</sup> The Executive Office of Communities and Development (EOCD) and the Executive Office of Manpower Affairs (EOMA) have also promulgated MEPA procedures but, unlike the aforementioned offices, have not structured their regulations to be generally inclusive of activities undertaken within their constituent agencies. Instead, the regulations promulgated by these two offices focus exclusively upon the MEPA procedures that will be required incident to specific functional activities undertaken by component agencies. In this regard, the EOCD has promulgated five separate sets of MEPA procedures, a separate set of regulations being applicable each to the activities of the Housing Appeals Committee (HAC),<sup>14</sup> to the Massachusetts Housing

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<sup>6</sup> Acts of 1974, c. 257 was approved by the Governor on May 28, 1974.

<sup>7</sup> By the provisions of Acts of 1974, c. 257, § 4, the impact report requirements of G.L. c. 30, § 62, as modified by Acts of 1974, c. 257, § 1, took effect on July 1, 1974.

<sup>8</sup> Executive Office of Consumer Affairs, "Regulations Relative to the Establishment of Procedures by Which Agencies Within the Executive Office of Consumer Affairs Shall Comply with the Requirements of G.L. c. 30, s. 62, Relative to Environmental Impact Reports," filed Mar. 15, 1974, published Mar. 22, 1974. See also note 13 infra.

<sup>9</sup> Executive Office of Educational Affairs, "Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports," filed June 7, 1974, published June 18, 1974.

<sup>10</sup> Executive Office of Human Services, "Environmental Protection," codified as Title 9 of the Code of Human Services Regulations, filed and published Feb. 19, 1974. These regulations, based generally on the State Project Guidelines, were later clarified by "Amendments to Environmental Protection Regulations," filed on June 28, 1974, and published on July 11, 1974.

<sup>11</sup> Executive Office of Public Safety, "Rules and Regulations Relative to Environmental Impact of Agency Projects and Activities," filed Feb. 7, 1974, and published Feb. 8, 1974.

<sup>12</sup> Executive Office of Transportation and Construction, "Regulations Pursuant to Chapter 30, Section 62 of the Massachusetts General Laws for the Preparation of Environmental Impact Reports for the Agencies within the Executive Office of Transportation and Construction," filed Nov. 8, 1973, and published Nov. 15, 1973. These regulations were clarified by "Amendments to the Regulations Pursuant to Chapter 30, Section 62 of the Massachusetts General Laws for the Preparation of Environmental Impact Reports for the Agencies Within the Executive Office of Transportation and Construction," filed on June 6, 1974, and published on June 14, 1974.

<sup>13</sup> Executive Office of Consumer Affairs, "Regulations to Implement C. 30, s. 62, as amended by C. 257 of the Acts of 1974," filed Aug. 8, 1974, and published on Aug. 15, 1974. See also note 8 supra.

<sup>14</sup> Executive Office of Communities and Development, "Regulations Under Massachusetts Environmental Policy Act for the Housing Appeals Committee" (HAC MEPA Regs.), filed on July 30, 1974, and published on August 6, 1974.

Finance Authority (MHFA),<sup>15</sup> and to three named functions of the Department of Community Affairs (DCA) as it participates in the development of state-aided public housing,<sup>16</sup> in urban renewal projects,<sup>17</sup> and in activities undertaken by urban redevelopment corporations.<sup>18</sup> A similar function-oriented approach has been taken by the EOMA, in regulations published as this chapter was going to press, with respect to the review of municipal applications for approval of industrial development financing bonds by the State Industrial Finance Board.<sup>19</sup> As of this writing, no MEPA regulations of any sort have been promulgated by the Executive Office of Administration and Finance or by the Executive Office of Elder Affairs. The Executive Office of Environmental Affairs has not promulgated any regulations apart from the two Guidelines; to comply with MEPA, agencies within that executive office are to be guided by the general precepts of the Guidelines. To the extent that there may not be executive office MEPA regulations applicable to a given agency or function, the appropriate set of Guidelines will apply. The following table sets forth the MEPA rules and regulations in effect as of November 1, 1974:

<u>Executive Office</u>	<u>Title of Regulations</u>	<u>Filed</u>
Communities and Development	Regulations Under Massachusetts Environmental Policy Act for the Housing Appeals Committee.	7/30/74
	Regulations Under Massachusetts Environmental Policy Act for the Massachusetts Housing Finance Agency.	8/19/74

<sup>15</sup> Executive Office of Communities and Development, "Regulations Under Massachusetts Environmental Policy Act for the Massachusetts Housing Finance Agency" (MHFA MEPA Regs.), filed on Aug. 19, 1974, and published on Aug. 26, 1974.

<sup>16</sup> Executive Office of Communities and Development, "Regulations Under Massachusetts Environmental Policy Act for Local Housing Authorities and the Department of Community Affairs with respect to State-Aided Public Housing" (DCA Housing MEPA Regs.), filed on Aug. 19, 1974, and published on Aug. 26, 1974.

<sup>17</sup> Executive Office of Communities and Development, "Regulations Under Massachusetts Environmental Policy Act for the Department of Community Affairs and Local Redevelopment Agencies" (DCA Urban Renewal MEPA Regs.), filed Aug. 26, 1974, and published Sept. 5, 1974.

<sup>18</sup> Executive Office of Communities and Development, "Regulations Under Massachusetts Environmental Policy Act for the Department of Community Affairs Approval of 121A Corporations" (DCA Urban Redevelopment MEPA Regs.), filed Aug. 26, 1974, and published Sept. 5, 1974. For a discussion of the functional aspects of the urban redevelopment corporation, see Hassett, *Tax Aspects of Urban Redevelopment Corporations*, 1972 *Ann. Surv. Mass. Law* §§ 17.1-8, at 435-54.

<sup>19</sup> Executive Office of Manpower Affairs, "Environmental Impact Report Regulations for Industrial Revenue Bond Financing Under Chapter 40D" (EOMA Industrial Development MEPA Regs.), filed Oct. 21, 1974, and published on Oct. 28, 1974.

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<u>Executive Office</u>	<u>Title of Regulations</u>	<u>Filed</u>
	Regulations Under Massachusetts Environmental Policy Act for the Department of Community Affairs Approval of 121A Corporations.	8/26/74
	Regulations Under Massachusetts Environmental Policy Act for the Department of Community Affairs and Local Redevelopment Agencies.	8/26/74
	Regulations Under Massachusetts Environmental Policy Act for Local Housing Authorities and the Department of Community Affairs with respect to State-Aided Public Housing.	8/19/74
Consumer Affairs	Regulations Relative to the Establishment of Procedures by Which Agencies Within the Executive Office of Consumer Affairs Shall Comply with the Requirements of G.L. c. 30, s. 62, Relative to Environmental Impact Reports.	3/15/74
	Regulations to Implement C. 30, s. 62, as amended by C. 257 of the Acts of 1974.	8/8/74
Educational Affairs	Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports.	6/7/74
Environmental Affairs	Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports. <sup>20</sup>	6/29/73
	Amendments to Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports. <sup>21</sup>	10/15/73
	Regulations to Implement C. 30, s. 62, as amended by C. 257 of the Acts of 1974. <sup>22</sup>	7/2/74
Human Services	Environmental Protection. <sup>23</sup>	2/19/74
	Amendments of Environmental Protection Regulations.	6/28/74

<sup>20</sup> This regulation and the one following it in the table are referred to in this chapter as the State Project Guidelines.

<sup>21</sup> This regulation and the one preceding it in the table are referred to in this chapter as the State Project Guidelines.

<sup>22</sup> These regulations are referred to in this chapter as the Private Project Guidelines.

<sup>23</sup> The Executive Office of Human Services had, in July 1973, adopted MEPA proce-

<u>Executive Office</u>	<u>Title of Regulations</u>	<u>Filed</u>
Manpower Affairs	Environmental Impact Report Regulations for Industrial Revenue Bond Financing Under Chapter 40D.	10/21/74
Public Safety	Rules and Regulations Relative to Environmental Impact of Agency Projects and Activities.	2/7/74
Transportation and Construction	Regulations Pursuant to Chapter 30, Section 62 of the Massachusetts General Laws for the Preparation of Environmental Impact Reports for Agencies Within the Executive Office of Transportation and Construction.	11/8/73
	Amendments to the Regulations Pursuant to Chapter 30, Section 62 of the Massachusetts General Laws for the Preparation of Environmental Impact Reports for the Agencies Within the Executive Office of Transportation.	6/6/74
(Massachusetts Health and Educational Facilities Authority) <sup>24</sup>	Environmental Impact Regulations.	10/4/73

The various executive office MEPA regulations have several interesting features. To suit administrative needs peculiar to a given agency, the standard review procedures of the Guidelines were not followed in the development of several executive office MEPA regulations. In some cases these regulations permit agencies to phase environmental review procedures to correspond with different stages of decision-making involved in the approval of a given project, while in other instances the executive office regulations have deviated from the Guideline procedures and have imposed additional documenting requirements. Curiously, many of these modifications are found in the regulations of the EOCD. For example, in the EOCD regulations governing HAC MEPA procedures, the HAC is allowed to render its

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dures entitled "Environmental Impact Reports," by incorporating by reference the State Project Guidelines. By their own terms these earlier regulations expired on Oct. 31, 1973.

<sup>24</sup> The Massachusetts Health and Educational Facilities Authority is the only state authority which has adopted MEPA procedures independently of an executive office, as of this writing.

decision in the review of a local determination to deny a comprehensive permit even if the environmental review of the subject project is incomplete.<sup>25</sup> However, to prevent this modification from abrogating MEPA, these HAC regulations stipulate that no action may be taken to implement the HAC permit determination rendered prior to the completion of the MEPA review, and that determinations thus rendered remain subject to modifications dictated by the MEPA environmental findings.<sup>26</sup> An interim approval procedure is also found in the EOCD regulations governing the DCA's MEPA obligations in its review of urban renewal proposals.<sup>27</sup> If the DCA finds that the local renewal agency is unable to document all the environmental impacts of a proposed project as they may occur through the ultimate completion of the project, it may make its MEPA findings based upon the best information then available.<sup>28</sup> In instances in which the DCA's approval of a project is thus incomplete, the DCA may require that approval of subsequent land disposition agreements be conditioned upon further MEPA findings.<sup>29</sup> To insure that this interim approval procedure will still produce adequate compliance with MEPA, the DCA may expand upon the basic MEPA requirements by requiring that the local urban renewal authority augment its initial MEPA review by undertaking a "follow-up" environmental study of the renewal project, or a portion thereof.<sup>30</sup> The documenting and review procedures involved in the original environmental review are to be followed in such "follow-up" studies.<sup>31</sup> Moreover, "follow-up" reports are to address specifically any impacts which were noted in the original impact report as being "uncertain, either in occurrence or magnitude."<sup>32</sup> A similar "follow-up" procedure is found in the regulations governing DCA MEPA obligations in actions involving urban redevelopment corporations.<sup>33</sup>

An additional documenting requirement, different from that found in the EOCD regulations described above, is found in the EOCD regulations governing the DCA's MEPA obligations in its review of state-aided housing project proposals. These regulations require that the

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<sup>25</sup> HAC MEPA Regs., *supra* note 14, § 5.1.A.1.

<sup>26</sup> *Id.*

<sup>27</sup> DCA Urban Renewal MEPA Regs., *supra* note 17.

<sup>28</sup> *Id.* § 6.A.

<sup>29</sup> *Id.* §§ 6.B-6.E.

<sup>30</sup> *Id.* § 6.1.

<sup>31</sup> *Id.* §§ 6.1A, 6.1B.

<sup>32</sup> *Id.* § 6.1.C.

<sup>33</sup> DCA Urban Redevelopment Regs., *supra* note 18, § 4.3.B.

developing authority<sup>34</sup> submit, at appropriate stages in its application for state aid, documents, termed Environmental Data Forms (EDFs),<sup>35</sup> for each project site then under consideration.<sup>36</sup> Apparently, these EDFs are being used by the DCA as a vehicle with which to generate, in one submission, data to be considered in decision-making required by MEPA and other statutes. The responses required by the EDFs are much more comprehensive in detail and scope than those required in EAFs. It is on the basis of the EDFs submitted by developing authorities that the DCA will prepare its EAF for a given state-aid housing project.<sup>37</sup>

The various executive office MEPA regulations are also noteworthy for the extent to which they elaborate upon the relationships among the Secretary of Environmental Affairs, other Secretaries, state agencies and project applicants. It should be observed that in the state-aid housing regulations described above, although the developing authority provides the technical data in its EDF, the DCA remains responsible for the preparation of the EAF.<sup>38</sup> However, once it is determined from such an EAF that an impact report should be prepared, these regulations state that the report will be prepared by the developing authority, subject to DCA supervision.<sup>39</sup> Some similarities exist in the MEPA procedures applicable to the activities of the State Industrial Finance Board.<sup>40</sup> Under these regulations, prospective industrial tenants of municipal financing authorities must submit to the state board detailed data concerning the project, the project site, and the effect of the project upon the site.<sup>41</sup> On the basis of this data the state board will prepare an EAF for the project.<sup>42</sup> If it is determined on the basis of this EAF that a report will be prepared for the project, these regulations require that the report be prepared by the local industrial development authority and be submitted as a necessary element of the application for state board approval of the industrial development bond financing proposal.<sup>43</sup> By contrast, the EOCD regulations describing the DCA's MEPA obligations in activities involving urban redevelopment corporations state that, although the DCA is ultimately re-

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<sup>34</sup> The developing authorities subject to the provisions of these regulations are local housing authorities created under G.L. c. 121B, § 3, regional housing authorities created under G.L. c. 121B, § 3A, or any other legally constituted agency with the powers of a local housing authority. The DCA itself is included within the scope of this definition. DCA Housing MEPA Regs., *supra* note 16, § 2.9.

<sup>35</sup> DCA Housing MEPA Regs., *supra* note 16, §§ 1.5, 3.1, & Appendices A & B.

<sup>36</sup> *Id.* § 3.1A.

<sup>37</sup> *Id.* § 3.2A.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 4.1.B.

<sup>40</sup> EOMA Industrial Development MEPA Regs., *supra* note 19, § 3.2.

<sup>41</sup> *Id.* § 4.1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* § 4.2.

sponsible for circulation of EAFs<sup>44</sup> and preparation of the impact report,<sup>45</sup> it is the applicant<sup>46</sup> who must complete the EAF for the DCA.<sup>47</sup>

Several of the executive office MEPA regulations contain other important provisions. For example, in the regulations outlining MHFA MEPA procedures, an EAF must be reviewed by the Secretary of Communities and Development before being passed on for review and approval by the Secretary of Environmental Affairs.<sup>48</sup> In addition, in these regulations the Secretary of Communities and Development has given himself authority to override an MHFA determination on whether or not to prepare an environmental impact report.<sup>49</sup> Another noteworthy provision is found in the HAC MEPA regulations in which the HAC is permitted, in the review of denials of applications for comprehensive permits for projects to be funded by either MHFA or the DCA, to satisfy all of its MEPA obligations by imposing as a condition to the effectiveness of the permit that the MHFA and the DCA comply fully with MEPA before making any final financial commitment.<sup>50</sup>

Perhaps the most important feature of the several executive office MEPA regulations is the extent to which they variously elaborate upon the eight classes of categorical exemptions prescribed by the State Project Guidelines.<sup>51</sup> The categorical exemptions of these executive office regulations facilitate the early determination of what projects will or will not require the preparation of an environmental impact report by establishing standard thresholds that in most cases will determine which activities will be deemed to have the potential to cause "damage to the environment." Typically, these categorical exemptions rely upon a stated activity type,<sup>52</sup> project cost<sup>53</sup> or project size<sup>54</sup> as the threshold norm.

**§18.5. MEPA: Enforcement.** Although the efficacy of the MEPA review program will depend in large measure upon the administrative

<sup>44</sup> DCA Urban Redevelopment MEPA Regs., *supra* note 18, § 3.2.

<sup>45</sup> *Id.* § 4.3.B.

<sup>46</sup> *Id.* § 2.2.

<sup>47</sup> *Id.* § 3.2.A.

<sup>48</sup> MHFA MEPA Regs., *supra* note 15, § 3.2.

<sup>49</sup> *Id.* § 3.2.B.

<sup>50</sup> *Id.* §§ 3, 3.1.

<sup>51</sup> State Project Guidelines § 8.1.

<sup>52</sup> *E.g.* housing rehabilitation projects financed by the MHFA. See MHFA MEPA Regs., *supra* note 15, § 6.1.

<sup>53</sup> *E.g.*, the licensing, certification, or relicensing of certain facilities costing five million dollars or less by the Dep't of Pub. Health. Executive Office of Human Services, MEPA Regs., *supra* note 10, 9 C.H.S.R. § 204.7 (h)(1).

<sup>54</sup> *E.g.*, activities involving sites of less than two acres used for the stockpiling of various substances. Executive Office of Transportation and Construction, MEPA Regs., *supra* note 12, § 8.2, class 4.



process that implements it, there is a corresponding need that the process be enforceable. MEPA, as originally enacted, was silent not only as to the method of its implementation, but also as to the method of its enforcement. Contemporaneously with the development of the administrative regime discussed in the preceding two sections, several events combined to clarify significant substantive and procedural issues regarding MEPA's enforceability. These events, which include actions brought to enforce compliance with MEPA and an amendment to that statute, have defined somewhat the nature of the MEPA process and the procedures involved in its enforcement.

Some of this definition was provided by the Supreme Judicial Court in *City of Boston v. Massachusetts Port Authority*<sup>1</sup> (hereinafter cited as *Massport*), the first case brought before the Court to enforce MEPA. As part of an action brought to thwart plans by the defendant Massachusetts Port Authority (Massport) to construct a new South Passenger Terminal and ancillary facilities (the project) at Logan Airport, the city of Boston argued that Massport had failed to comply with MEPA. The Massport commitment to construct the project was made in April 1973, at a time when only one of the two sections of MEPA was effective. Section 61 of chapter 30 of the General Laws, which requires state agencies to make a *finding* as to the environmental impact of their projects, was effective as of December 31, 1972, and thus applied to Massport's determination to proceed with the project; the environmental impact report requirement of section 62 of chapter 30, on the other hand, was not effective until July 1, 1973.<sup>2</sup> When the Massport board voted to proceed with the project, it also adopted a resolution, largely paraphrasing the language of section 61, intended to satisfy the section 61 requirement that it make a finding regarding the environmental damage, if any, that would result from the project. But because its vote antedated the effective date of section 62, Massport did not prepare an environmental impact report for the project. Notwithstanding the fact that the project was not subject to the section 62 report requirement, the city sought judicial review of the adequacy of the Massport section 61 finding, arguing that, in the absence of a section 62 report, there should be other means for Massport to have demonstrated, and for the judiciary to test, the sufficiency of the Massport MEPA finding. The city further argued that, in order to prevent the purposes of MEPA from being "circumvented by mere recitals of the statutory language unsupported by any actual evalua-

§18.5. <sup>1</sup> 1974 Mass. Adv. Sh. 187, 308 N.E.2d 488, 6 E.R.C. 1337, 4 E.L.R. 20314.

<sup>2</sup> The two-phased implementation of MEPA was provided for in Acts of 1972, c. 781, § 3.

tion of impact," Massport should have prepared an "explanatory statement" detailing the environmental factors and reasoning underlying its determination to proceed with the project.<sup>3</sup> In the absence of such a statement, the city argued, the trial court should have permitted it to test the adequacy of the Massport section 61 finding by adducing extrinsic evidence. The Supreme Judicial Court was unpersuaded by this line of argument and affirmed the superior court ruling that, since the phased implementation of MEPA was part of a "comprehensive legislative scheme," Massport had to comply only with section 61, not section 62.<sup>4</sup> The Court's decision thus made it impossible to determine whether Massport failed to comply with MEPA.

Although the case thus framed did not lead the Court to a definitive statement on how state agencies might best satisfy their MEPA obligations, the Court's opinion is noteworthy for the extent to which its decision may portend future judicial responses to MEPA claims. In evaluating the city's argument that the adequacy of this Massport section 61 finding should be subjected to traditional independent judicial review, the Court made an elaborate investigation of the nature of the MEPA process. The Court noted that, although it has held invalid administrative determinations that attempted to pass off as "findings" mere recitals of stated statutory conditions, the MEPA process is distinguishable because the legislature has clearly established the section 62 report as the vehicle for justifying and testing section 61 findings.<sup>5</sup>

The Court further justified its refusal to permit review of the Massport section 61 finding by examining the nature of the MEPA process within the context of precedent defining the scope of judicial review to be accorded different types of administrative action. Agency determinations are generally characterized as either regulatory or adjudicatory, and the scope of judicial review to which an agency decision will be subject will be determined by this characterization.<sup>6</sup> Adjudicatory actions—actions which are often determinative of substantial rights of particular persons—are subject to judicial review that reaches to their factual and legal basis.<sup>7</sup> By contrast, regulatory actions such as rulemakings that do not directly affect the particular legal in-

<sup>3</sup> 1974 Mass. Adv. Sh. at 208, 308 N.E.2d at 502, 6 E.R.C. at 1346, 4 E.L.R. at 20320.

<sup>4</sup> Id. at 207-08, 308 N.E.2d at 501-02, 6 E.R.C. at 1345-46, 4 E.L.R. at 20319-20.

<sup>5</sup> Id. at 208 n.37, 308 N.E.2d at 502 n.37, 6 E.R.C. at 1346 n.37, 4 E.L.R. at 20320 n.37.

<sup>6</sup> For a discussion of the different types of administrative actions, see *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 494-98, 204 N.E.2d 504 (1965). For a discussion of the scope of judicial review to be accorded these different types of administrative action, see *Cambridge Elec. Light Co. v. Department of Pub. Util.*, 1973 Mass. Adv. Sh. 645, 659, 295 N.E.2d 876, 886.

terests of specific persons are not reviewable by examination and criticism of the factual or legal rationale underlying the agency action.<sup>8</sup> Because it determined that the finding required by section 61 usually would not affect the rights of private parties, the Court ruled that it was more aptly analogized to a regulatory function and thus generally not subject to judicial review.<sup>9</sup> The Court elaborated further, observing that in instances in which an agency determination might give rise to a public health exigency, courts might be encouraged to overcome their traditional reluctance to review a regulatory determination; however, such action would only be availing where all alternative procedures for challenging the determination had been exhausted.<sup>10</sup> Since such an alternative procedure is contained in section 62, the Court refused to utilize this public health exigency exception, notwithstanding the fact that the peculiar circumstances of the phased implementation of MEPA precluded application of the alternative impact report procedure otherwise contained in section 62 to the contested Massport determination.<sup>11</sup>

Several questions persist as to how the Court's disposition of the MEPA claim raised in this particular case may be applied in future litigation involving MEPA. Doubtless the basic procedural requirements of MEPA—to make a section 61 finding and to document significant environmental impacts in a section 62 report—will be enforced by the judiciary. But to what extent the enforcement of MEPA will extend beyond these procedural matters to the review and enforcement of more substantive dimensions of MEPA is much less clear. As noted above, the Court stated that compliance with the requirements of section 61 should be tested and enforced by resort to the "alternate" procedures of section 62 "before judicial review becomes appropriate."<sup>12</sup> This statement apparently indicates that section 61 findings will be accorded some substantive enforcement by reference to the appropriate section 62 report. Yet several questions remain unresolved as to the manner of MEPA's enforcement. For example, it has yet to be determined *how* section 62 reports prepared by

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<sup>7</sup> *Salisbury Water Supply Co. v. Department of Pub. Util.*, 344 Mass. 716, 184 N.E.2d 44 (1962).

<sup>8</sup> *Cambridge Elec. Light Co. v. Department of Pub. Util.*, 1973 Mass. Adv. Sh. 645, 659, 295 N.E.2d 876, 886.

<sup>9</sup> *City of Boston v. Massachusetts Port Auth.*, 1974 Mass. Adv. Sh. 187, 210-11, 308 N.E.2d 488, 503, 6 E.R.C. 1337, 1347, 4 E.L.R. 20314, 20320.

<sup>10</sup> *Id.* at 212, 308 N.E.2d at 504, 6 E.R.C. at 1347-48, 4 E.L.R. at 20321.

<sup>11</sup> *Id.* at 212 n.43, 308 N.E.2d at 504 n.43, 6 E.R.C. at 1348 n.43, 4 E.L.R. at 20321 n.43.

<sup>12</sup> *Id.* at 212, 308 N.E.2d at 504, 6 E.R.C. at 1348, 4 E.L.R. at 20321.

a state agency will be used to test the adequacy of section 61 findings also made by that agency. In *Massport* the Court ruled that in the absence of a section 62 report, the city could not utilize extrinsic evidence to test the adequacy of Massport's section 61 finding. It is unclear whether the Court's ruling would also prohibit the use of extrinsic evidence to test the adequacy of section 61 findings that *have* been included in a section 62 report, to test section 62 reports themselves, to test decisions not to prepare reports ("negative assessments"), to test determinations as to whether a given activity is a "state project" or a "private project," or to test any other administrative determination made under MEPA.<sup>13</sup>

Challenges to alleged violations of procedural or substantive requirements of MEPA must now be brought within time periods specified in that statute. The pressures that prompted the legislature to provide a modified scope of impact analysis for private projects also produced another significant modification to MEPA—the creation of a statute of limitations for bringing judicial challenges to MEPA determinations and reports. Section 2 of chapter 257 of the Acts of 1974 amended section 62 of chapter 30 by inserting the following paragraph:

Any action or proceeding alleging that an agency, department, board, commission, authority or authority of any political subdivision has improperly determined whether a work, project or activity may cause significant damage to the environment shall be commenced not later than sixty days after the date upon which the secretary of environmental affairs shall issue his comment, if any, on the environmental impact report prepared by such agency, department, board, commission, authority or authority of any political subdivision in connection with such work, project or activity, or not later than ninety days after the date upon which

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<sup>13</sup> Some of these questions may be resolved as a result of a second MEPA action which was developing as this chapter was going to press. On May 24, 1974, the city of Boston brought suit to enjoin Massport from undertaking another airport expansion project, alleging that Massport had failed to comply with § 62 of MEPA. (Suffolk Eq. No. 99492). On July 17, 1974, a similar suit was brought against Massport by the Secretary of Environmental Affairs and the Secretary of Transportation and Construction. (Suffolk Civ. No. 521). On August 26, 1974, in the consolidated trial of these two actions, Superior Court Justice Mason entered Findings, Rulings and an Order for Judgment enjoining further activity on the airport project pending preparation of a § 62 report. On December 6, 1974, the appeal of these actions was urged before the Supreme Judicial Court, having been certified for direct appeal. (Sup. Jud. Ct. Eq. Nos. 112 & 113, respectively).

such agency, department, board, commission, authority or authority of any political subdivision shall have transmitted such report to said secretary, whichever date occurs first. Any action or proceeding alleging that an environmental impact report fails to comply with the provisions of this section shall be commenced no later than thirty days after the date upon which the final environmental impact report has been transmitted by an agency, department, board, commission, authority or authority of any political subdivision to the secretary of environmental affairs. In the event that the comments of the secretary of environmental affairs indicate his detailed reasons for his finding that such final environmental impact report fails to comply with the provisions of this section, the time during which any action may be commenced alleging that such report fails to comply with said section shall be extended for an additional period of thirty days.<sup>14</sup>

By establishing these fixed points—a contingent point is provided in each instance—the amendment purports to impose limits upon the time within which actions may be brought to contest the adequacy of environmental assessments and environmental impact reports. However, the amendment does not completely resolve all uncertainty concerning the bringing of challenges to MEPA. One such shortcoming in the amendment arises from the fact that the first sentence, ostensibly intended to limit challenges to environmental assessments, contains a textual incongruity that may frustrate attempts to use it to effectuate the intended limitation.<sup>15</sup> The sentence seeks to impose the limitation upon challenges to assessments by marking time from dates incident to the processing of a report. Read in this way, the limitation on challenges to assessments would be effective only in those instances in which a report has been prepared, an event which, by virtue of the remaining two sentences of the amendment, is subject to a separate limitation. Since no impact report is prepared in the converse situation, *i.e.*, where an agency files a negative assessment, the limitation does not become effective. Until such time as this linguistic defect is corrected, it is arguable that there now is no limitation in MEPA on the time within which challenges to negative assessments may be made.

There is no similar inconsistency that would thwart the amendment's intended limitation upon challenges to reports. The

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<sup>14</sup> Acts of 1974, c. 257, § 2, amending G.L. c. 30, § 62.

<sup>15</sup> The statutes of limitations contained in Acts of 1974, c. 257, § 2 did not appear in the 1974 MEPA revision legislation until shortly before its passage. On May 9, 1974, nineteen days before the bill was finally approved by the Governor, the Senate revised H. 5828, the bill which ultimately became c. 257, to include these limitations. The technical defect appeared when this amendment was made. See *The Journal of the Senate*, May 9, 1974, at 814-15.

limitation on such challenges is similar to that for assessments in that it also runs from contingent dates. Challenges to reports must be filed within thirty days of the date such report has been transmitted to the Secretary of Environmental Affairs. The period for filing challenges to reports is extended for another thirty days<sup>16</sup> if the Secretary of Environmental Affairs has filed comments on the report which indicate, in detailed reasons, that the report does not adequately comply with section 62. The amendment does not state what sort of "detailed reasons" must be provided by the Secretary of Environmental Affairs in order to effectuate this extension of the statute of limitations. It can be anticipated, however, that in the most egregious cases, cases of the sort contemplated by this provision in the amendment, the Secretary will make it apparent, either by express terms or by the vehemence of his criticism, that the period for contesting the report in question should be extended by the additional thirty days. In instances in which the Secretary's comments merely infer inadequate compliance with section 62, or merely give a cursory statement as to the reasons supporting an asserted inadequacy, it may be more difficult to determine whether the period for filing a challenge to a section 62 report can be said to have been expanded.<sup>17</sup>

Several other aspects of this limitation should be observed. The amendment purports to place limitations upon challenges to assessments and reports prepared pursuant to section 62. It does not address the principal requirements of section 61, that state agencies make "findings" concerning their activities. In its *Massport* ruling, the Court held that section 61 findings could be challenged only within the context of the accompanying section 62 report.<sup>18</sup> It remains to be seen whether challenges to section 61 findings can utilize extrinsic evidence to measure the adequacy of the section 62 report. It is arguable that the use of such evidence to test a section 61 finding and, implicitly, the section 62 report upon which it is based, would be a circumvention of the section 62 statute of limitations if the section 61 challenge were brought after the expiration of the section 62 challenge period.

It should also be noted that the limitations imposed by this amend-

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<sup>16</sup> The amendment does not precisely indicate the point from which this additional thirty days is to run. It merely states that the period for challenge will be extended if the Secretary's comments are noted in a specified manner. Two constructions are possible: either the period will be extended thirty days from the date upon which the Secretary issues his comment, or the period will be extended thirty days beyond the thirty day challenge period specified in the amendment (i.e., to thus create a sixty day period for challenging impact reports).

<sup>17</sup> This determination might be facilitated by an examination of the Secretary's comments in other reports, as well as by an analysis of the comments on a given report by other reviewing agencies.

<sup>18</sup> 1974 Mass. Adv. Sh. at 209, 308 N.E.2d at 502-03, 6 E.R.C. at 1346, 4 E.L.R. at 20320.

ment interact with the advance notice requirements of chapter 214, section 10A of the General Laws, the so-called "citizen suit" statute.<sup>19</sup> Petitioners intending to use that statute to prevent damage to the environment in most cases must provide written notice to named parties at least twenty-one days prior to the commencement of the action. Since this statute appears to be one of the principal vehicles for raising MEPA claims, it is recommended that Massachusetts practitioners pay careful attention to the relation between the statute of limitations now found in MEPA and the advance notice requirement of the citizen suit statute.

**§18.6. MEPA: An analysis.** Like a number of other states, Massachusetts has sought through MEPA to make environmental considerations a routine element in state government decision-making.<sup>1</sup> And, although this experiment has not spawned the plethora of litigation that has been the hallmark of the federal environmental review experience under NEPA,<sup>2</sup> MEPA has been the subject of some controversy.<sup>3</sup> This controversy has given rise not only to the program-wide changes legislated in 1974 (imposing a statute of limitations on challenges to MEPA section 62 actions and creating a limited scope of review for private projects) discussed above, but also to several modifications of specific applications.<sup>4</sup> Some of these specific

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<sup>19</sup> For a discussion of this statute, see Johnson & Miller, *Environmental Law*, 1971 Ann. Surv. Mass. Law §§ 8.2-5, at 150-59; McGregor, *Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute*, 1 Environ. Affairs 606 (1971).

§18.6. <sup>1</sup> For a discussion of some of these state environmental review acts, see Haggman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 Urban L. Ann. 3 (1974); Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 E.L.R. 50090 (1973). A compilation of the state and municipal environmental impact review programs in effect as of Aug. 1, 1974 is found in Council on Environmental Quality, *Fifth Annual Report* 421-28 (1974) (Appendix to ch. 4).

<sup>2</sup> For a discussion of the litigation that has arisen under NEPA, see Anderson, *The National Environmental Policy Act*, in *Federal Environmental Law* 238-419 (Environ. Law Inst. 1974); Yarrington, *The National Environmental Policy Act*, Environ. Rep. Jan. 4, 1974 (Monograph No. 17).

<sup>3</sup> On March 20, 1974, C. Vincent Vappi, President of the Greater Boston Chamber of Commerce, testified before the legislature's Committee on Natural Resources in favor of legislation which would suspend all MEPA review of private development activities pending the results of a study as to what scope of review was intended to, or should, be given to private projects (Mass. H.R. 2218 (1974)), and, alternatively, legislation which would "clarify" MEPA (Mass. S. 1468 (1974)). In support of this legislation, Mr. Vappi stated, *inter alia*, that, because inadequate budgetary allotments did not give state agencies the resources necessary to adequately fulfill their MEPA mandate, private developers had to contend with intolerable administrative delays and legal uncertainties that inhibited business activity. Statement of C. Vincent Vappi, President, Greater Boston Chamber of Commerce, Mar. 20, 1974. A copy of this statement is on file at the offices of the Annual Survey of Massachusetts Law.

<sup>4</sup> It should be noted that, as in Massachusetts, some other state environmental policy acts have been amended. See, e.g., Roe & Lean, *The State Environmental Policy Act of*

modifications have resulted from other legislative enactments. In 1973, when it amended chapter 21, sections 26-58 of the General Laws, the Massachusetts Clean Waters Act, the legislature exempted the Division of Water Pollution Control from all environmental impact review obligations relating to the construction of publicly-owned wastewater treatment facilities.<sup>5</sup> In 1974 the Emergency Finance Board was exempted from the environmental impact report obligations of section 62 for those of its activities for which "there has been previous compliance with said section by another [state agency]."<sup>6</sup> Other modifications have been effected by special clearances issued by the Secretary of Environmental Affairs to authorize deviation from MEPA procedures when it became apparent that strict adherence to MEPA requirements would hinder action necessary to deal with an emergency situation.<sup>7</sup> The Secretary of Environmental Affairs has also

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1971 and Its 1973 Amendments, 49 Wash. L. Rev. 509 (1974); Comment, Aftermammoth: Friends of Mammoth and the Amended California Environmental Quality Act, 3 Ecol. L.Q. 349 (1973).

<sup>5</sup> Acts of 1973, c. 546, § 16. The Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-58, was amended by Acts of 1973, c. 546, to bring it into conformance with the requirements of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. II, 1972). The EPA enjoys an exemption from NEPA in all of its water pollution control activities except those related to the financing of publicly-owned wastewater treatment facilities and to the issuance of a new source discharge permit. 33 U.S.C. § 1371(c) (Supp. II, 1972). For a discussion of the interaction of the Massachusetts Clean Waters Act and the Federal Water Pollution Control Act, see O'Brien & Deland, *Environmental Law*, 1973 Ann. Surv. Mass. Law §§ 6.2-7, at 144-78.

Certain defined exemptions to NEPA have been granted to the EPA and other federal agencies. As a result of § 7 of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, NEPA was made inapplicable to the air pollution control regulatory activities of the EPA, to actions taken by the EPA relative to the use of coal in power plants, and to the expeditious issuance by the FPC of an electric energy transmission facility permit for a specific site on the United States-Canada border. Section 203(d) of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973), exempted the controversial Trans-Alaska Pipeline project.

<sup>6</sup> Acts of 1974, c. 819, § 1. It should be observed that ambiguous phrasing in the statute may lead to some problems of interpretation. First, the exemption granted to the Board only encompasses the necessity of preparing a § 62 report. The requirements of § 61, that the Board make certain findings, still apply to all of its activities. Presumably, these findings will be based on data provided by the other state agency or agencies whose compliance with MEPA is necessary before the exemption granted by the statute is triggered.

Second, the reliance upon "previous compliance" by another state agency may cause some problems where no other state agency can be shown to have MEPA obligations. Such a situation may arise in cases in which the Board is the only state agency involved in the review of a financing proposal submitted by a municipal department other than an authority. Because no other state agency would be involved in this instance the Board would be the only agency with MEPA obligations.

<sup>7</sup> For example, "[o]n September 6, 1974, the Secretary approved a request by the Massachusetts Department of Public Health to commence emergency spray action to control mosquito population to prevent a potential outbreak of equine encephalitis," 2



utilized the advisory ruling procedure of the State Administrative Procedure Act<sup>8</sup> to furnish guidance to state agencies as to the applicability of MEPA to unique fact situations not addressed in MEPA regulations.<sup>9</sup>

These developments indicate that MEPA and the procedures created to implement it form a process continually developing as a result of administrative, legislative, and judicial activity. If the experience thus far is an accurate barometer of how the MEPA process will develop in the near future, most key developments will be of administrative origin. As this chapter was going to press, the Secretary of Environmental Affairs, on the basis of more than a year's experience in reviewing MEPA impact reports, deemed it necessary to revise both the State Project Guidelines and Private Project Guidelines and had circulated for public comment draft revisions to both Guidelines.<sup>10</sup> Further refinements can be expected to the various executive office MEPA regulations as they respond to these new guideline regulations and as they develop the scope of report statements required under the Private Project Guidelines.<sup>11</sup> Although it is likely that the principal developments in the MEPA process will result from the administrative trends discussed above, it is possible that judicial and legislative actions could be of some importance in resolving key problems of statutory interpretation and program definition. Future directions of legislative origin may be influenced by the report of a special legislative commission established during the 1974 Survey year to make "an investigation and study of the implementation and effects [of MEPA] and regulations promulgated [thereunder]."<sup>12</sup>

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Section 62 Monitor No. IX, 40 (Sept. 18, 1974); and an emergency exemption was granted on Jan. 15, 1974 (pursuant to the provisions of § 3.1(3) of the State Project Guidelines) to the Dep't of Public Health to issue variances for the use of coal by certain electric utilities. 1 Section 62 Monitor No. V, 1 (Jan. 23, 1974).

<sup>8</sup> G.L. c. 30A, § 8.

<sup>9</sup> For example, the Secretary made rulings regarding the retroactive application of G.L. c. 30, § 62 to loan commitments made by the Massachusetts Housing Finance Agency, and other agency approvals, for projects processed prior to July 1, 1973, the date on which § 62 became effective. 1 Section 62 Monitor No. IX (Mar. 28, 1974).

<sup>10</sup> These draft regulations were dated Nov. 25, 1974.

<sup>11</sup> Private Project Guidelines § 5.1. See §18.3 n.32 *supra*.

<sup>12</sup> Resolves of 1974, c. 50. The commission is to study the "costs and benefits" of the environmental review of private projects, the "capabilities" of state agencies to administer a MEPA program, and the administrative regime that has been established to implement MEPA. As originally constituted, the membership of this special commission was to consist of thirteen members, comprising six legislators, the Secretary of Environmental Affairs, and six gubernatorial appointees (to include representatives of business, labor and environmental "interests"). *Id.* The number of gubernatorial appointees was increased to nine (to make a total commission membership of sixteen) by Acts of 1974, c. 819, § 2.

## B. ENVIRONMENTAL LAND USE CONTROL

**§18.7. Land use and the environment.** Traditionally the term "land use" has been associated with legal mechanisms exercised on the local government level, such as zoning and subdivision control. In recent years, however, the concept of land use has been broadened somewhat with the advent of urban renewal and other programs devised to promote better utilization of land areas and with increased state attention to matters related to public health and safety. The most dramatic broadening in the definition of land use has occurred during the past decade, as pollution control and resource protection have become more prominent elements in government decision-making, and as it has become apparent that solutions to pollution problems must entail more than regulation of existing sources of pollution. Over this period there has been a growing recognition that if a successful resource-protection strategy is to be devised, pollution controls must be applied not after decisions on land-utilization activities have been made, but preventively, to regulate activities that will further degrade areas already severely polluted and to protect pristine areas. But the application of such preventive control techniques will not be carried out in a political vacuum: in many cases resource-protection strategies will impinge upon other programs, such as industrial and commercial development, which, like resource protection, are important to social and economic well-being. Thus it must be realized that environment protection programs are part of a larger process that rationalizes resource-protection goals with other competing demands, and that, when effectively done, this rationalization will dictate efficient land usage.

As a result of several developments during the 1974 Survey year, land use control mechanisms have become a more prominent feature in resource-protection programs operating in Massachusetts. These developments are of both state and federal origin and in many cases utilize, or at least are compatible with, land use control devices that are already familiar elements of Massachusetts law. Some of these developments are discussed in the following three sections. The Wetlands Act, for many years an important and controversial resource-protection program, was revised by the legislature in 1974. The new Act is discussed in §18.8 *infra*. In response to increasing clamor that the scarce and fragile mountain areas of western Massachusetts not be ravaged as has been the case in states bordering Massachusetts to the north, the legislature enacted a statute specifically designed to protect the mountain areas of Berkshire County. This Berkshire mountain protection act is discussed in §18.9 *infra*. The 1974 legislature also responded to similar pressures to control development in Martha's Vineyard. This legislation is discussed in §18.10 *infra*.

**§18.8. Wetlands protection.** For some time Massachusetts has sought to provide special protection for those inland and coastal land and water areas known as wetlands. This protection has been provided by way of two distinct statutory programs: prospective regulation and case-by-case review. The prospective regulation program is comprised of two statutes<sup>1</sup> which together give the Department of Natural Resources (DNR) power to adopt orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering or polluting coastal<sup>2</sup> and inland<sup>3</sup> wetlands.<sup>4</sup> Such orders are subject to local review,<sup>5</sup> are enforceable in equity, and may be contested by persons who feel that the application of a particular order unreasonably restricts the use of their land.<sup>6</sup> Because of the technical complexities, expense and lengthy administrative procedures involved in their issuance, prospective protection orders are not yet a widespread feature of Massachusetts wetlands practice.<sup>7</sup>

By contrast, the case-by-case review of wetlands project proposals required by section 40 of chapter 131 of General Laws *has* become a more familiar procedure in Massachusetts land use control. Unlike the prospective protection statutes discussed above, section 40 provides a *unified* procedure for reviewing proposed activities in coastal *and* inland wetland areas.<sup>8</sup> During the 1974 Survey year section 40 was re-vised to clarify some procedural and substantive ambiguities.<sup>9</sup> Section

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§18.8. <sup>1</sup> G.L. c. 130, § 105, and G.L. c. 131, § 40A.

<sup>2</sup> G.L. c. 130, § 105. For a discussion of coastal wetlands programs in Massachusetts and its neighboring states, see Note, 52 B.U.L. Rev. 724 (1972).

<sup>3</sup> G.L. c. 131, § 40A. This statute also allows the DNR to issue orders delineating the boundaries of flood-prone areas within which no obstruction or encroachment may be placed without the express permission of the DNR. *Id.* Inland wetlands prospective protection orders do not affect agricultural uses of land. *Id.*

<sup>4</sup> The term "wetland" is defined in G.L. c. 131, § 40.

<sup>5</sup> A hearing must be held in municipalities affected by a proposed prospective coastal wetland protection order. G.L. c. 130, § 105. The local review procedure for proposed inland wetlands prospective protection orders is somewhat different. It gives a municipality within whose territorial limits inland wetlands or flood plains affected by a proposed DNR order are located an opportunity to temporarily stay the effect of that order. G.L. c. 131, § 40A.

<sup>6</sup> Both G.L. c. 130, § 105 and G.L. c. 131, § 40A provide that landowners may petition for a court determination as to whether prospective protection orders so restrict the use of their property as to constitute a taking without compensation. If the court finds that the order constitutes such a taking with respect to a particular landowner, it is to enter a finding that the order is not to apply to the landowner. The DNR may take land described in such a finding by resort to the eminent domain powers of G.L. c. 79.

<sup>7</sup> Inland protective orders are sometimes authorized by special acts. See, e.g., Acts of 1961, c. 548.

<sup>8</sup> The case-by-case review procedure formerly consisted of two statutes but was consolidated into its present one statute form by Acts of 1972, c. 784. See Miller, *Environmental Law*, 1972 Ann. Surv. Mass. Law § 21.11, at 612.

<sup>9</sup> Acts of 1974, c. 818, § 1.

40 requires, as a precondition to the lawful undertaking of any activity in a wetland area, that certain filing requirements be satisfied, that an order authorizing the activity be issued and all conditions imposed therein be complied with, and that all appeal periods elapse. The 1974 revision to section 40 continues to emphasize local responsibility over wetlands matters, yet refines the procedures whereby local wetland determinations may be appealed to the DNR.<sup>10</sup>

The procedure by which permission to undertake a wetlands project is obtained commences with the filing of a document, termed a "notice of intent," and descriptive plans with the local authority,<sup>11</sup> the DNR and the state Department of Public Works (DPW). This notice may not be filed until all local clearances obtainable at the time the notice of intention is filed have been obtained<sup>12</sup> and need not be filed for certain actions undertaken by public service utilities,<sup>13</sup> for emergency projects necessary to public safety or health undertaken by the Commonwealth or any political subdivision thereof,<sup>14</sup> or certain other specified projects.<sup>15</sup> Within twenty-one days of the receipt of this notice the local authority must hold a public hearing on the proposed project.<sup>16</sup> Within twenty-one days of this hearing, the local authority either must issue a written order specifying such conditions as it deems necessary for the protection of various resources,<sup>17</sup> or, if it determines that no such conditions are necessary, must notify the ap-

<sup>10</sup> At the time when the coastal and inland wetland case-by-case review statutes were consolidated, the municipalities were given primary regulatory responsibility. See note 8 *supra*.

<sup>11</sup> The regulation of wetlands activities is to be undertaken by a municipal conservation commission or, if none, by the board of selectmen, in a town, or the mayor, in a city. The regulating authority will be referred to in this section as the "local authority."

<sup>12</sup> The language of the previous version of § 40 imposed much more rigid requirements: it required that *all* local clearances be obtained prior to the filing of a notice of intention. See Acts of 1972, c. 784, § 1.

<sup>13</sup> Actions incident to the maintenance, repair or replacement of, which do not substantially change or enlarge, an existing and lawfully located public utility structure or facility need not be cleared through G.L. c. 131, § 40. This provision was first added to § 40 by Acts of 1974, c. 818.

<sup>14</sup> To qualify under this exemption the emergency project must be certified as such by the commissioner of the DNR and the municipality. This provision was first added to the text of § 40 by Acts of 1973, c. 719.

<sup>15</sup> E.g., mosquito control projects carried out under G.L. c. 40, § 5, G.L. c. 252, or any special act; cranberry bog maintenance work, and "work performed for normal maintenance or improvement of lands for agricultural use," G.L. c. 131, § 40.

<sup>16</sup> The statute specifies rigid requirements for advance notice of this public hearing. These requirements include public newspaper notice, and notice to the applicant and to specified municipal agencies as well as to the DNR and the DPW.

<sup>17</sup> The municipality is empowered to condition orders with a view towards the protection of water supply protection, flood control, storm damage prevention, pollution prevention, protection of shellfish areas, and the protection of fisheries. See § 18.9 n.10 *infra* for a catalogue of the resource values to be protected under the Berkshire mountains protection act.

plicant thereof.<sup>18</sup> Prior to 1974, section 40 was silent as to how questions regarding whether or not a given land was, in fact, a wetland were to be resolved. Now, a local authority, within ten days of receipt of a written request, may be compelled to determine if a specified site or project is subject to the provisions of section 40. To carry out any of the duties imposed by section 40, local authorities are authorized to enter onto privately-owned land.<sup>19</sup>

Section 40 also provides that persons aggrieved by a local authority's action or inaction in a given wetland matter may request that the DNR review the matter. The DNR itself may also initiate such reviews. The timetable for filing requests for DNR review is rigid and was changed somewhat in 1974 from that required by the previous statute. Such requests must now be filed<sup>20</sup> within ten days of the following events: the date on which the local authority issues a wetlands order; the last date by which the local authority should have held a public hearing on a notice of intent;<sup>21</sup> the last date by which the local authority, having held a public hearing, should have issued an order;<sup>22</sup> or the last date by which the local authority should have made a determination as to whether or not a given site or project is subject to section 40.<sup>23</sup> Within seventy days of the receipt of such a request,<sup>24</sup> the DNR must issue a written order<sup>25</sup> that will supersede any prior local order and which may impose such conditions as the DNR deems necessary<sup>26</sup> for resource protection.<sup>27</sup> Work may not be carried out pursuant to the provisions of a DNR wetland order until

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<sup>18</sup> A copy of all orders and notifications rendered on notices of intent must also be sent to the DNR and the DPW.

<sup>19</sup> The provision permitting entry to privately-owned land to inspect was first added to the predecessor of § 40 by Acts of 1973, c. 163. As thus added, the provision only allowed municipal officers to "enter upon the land upon which" the work was proposed to be done. *Id.* The 1974 revision to § 40 expanded this authority to give to municipalities the authority to enter upon all privately-owned land, thus facilitating a much wider scope of examination. Acts of 1974, c. 818.

<sup>20</sup> The statute imposes rigid requirements as to who must receive copies of these requests.

<sup>21</sup> The request for DNR review must be filed within thirty-one days of the filing of the notice of intent.

<sup>22</sup> The request for DNR review must be filed within thirty-one days of the public hearing.

<sup>23</sup> The request for DNR review must be filed within twenty days of the request for this determination.

<sup>24</sup> Section 40 requires that, within thirty days of a request for DNR review, the DNR must notify the "applicant" if the request is not in proper form.

<sup>25</sup> Requests for DNR review may be withdrawn at any time until the final DNR determination is rendered. Such withdrawals will be effective unless the DNR, within ten days of the notice of withdrawal, notifies all parties that it intends to proceed with the determination.

<sup>26</sup> The DNR may enter on to privately-owned land for the purposes of carrying out its duties under § 40. See note 19 *supra* & accompanying text.

<sup>27</sup> See note 17 *supra*.

ten days have elapsed following the issuance of the order.<sup>28</sup>

Section 40 also requires that before any wetlands project may be undertaken, the final order, determination or notification regarding a project must be entered into the property title record, and that a sign noting the wetlands project authorization must be displayed at the project site. Strong remedies are provided for ensuring that projects in wetlands are carried out only as specified in a duly issued section 40 wetlands order. Persons who own or acquire wetlands areas upon which a project is being or has been undertaken in violation of section 40 or an order issued thereunder may be compelled<sup>29</sup> to comply with the order or to restore the site to the condition that existed prior to the time when the violation first occurred.<sup>30</sup> Violations of section 40 are also punishable by fines and imprisonment. The 1974 revision to section 40 differs considerably from prior versions of the case-by-case wetlands project review statute in that it adds specific definitions, including elaborate inventories of botanic and technical designations, for many terms that heretofore had been controversial issues in Massachusetts wetlands practice.

It is likely that, even with the clarification provided by the new section 40, some procedural and substantive ambiguities will remain. Hopefully, many of these remaining infirmities will be remedied by rules and regulations slated to be promulgated by the Commissioner of the DNR.<sup>31</sup>

**§18.9. Land use control in Berkshire mountain regions.** During the 1974 legislative session two land use control measures were enacted for special regions in the Commonwealth. One such measure was effected by the insertion in chapter 131 of the General Laws a new section 39A which creates a program "to protect [the] watershed resources and preserve the natural scenic qualities" of the mountain regions of Berkshire County.<sup>1</sup> The Berkshire mountains statute

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<sup>28</sup> This provision is in apparent conflict with the statutory rights to judicial review created under the state Administrative Procedure Act, G.L. c. 30A, § 14(1). The section states that petitions for judicial review of agency decisions can be filed within thirty days of the agency's decision.

<sup>29</sup> These actions may be commenced by the attorney general, by the commissioner of the DNR, by a municipality, by an owner or occupant of property affected by the alleged wetland violation, or by a class of ten or more citizens under G.L. c. 214, § 7A.

<sup>30</sup> Where the action was brought to compel compliance with an order, the remedy would probably entail only such restoration as necessary to make the activity consistent with the terms of the order. However, where no order had been issued, the remedy would clearly require total restoration.

<sup>31</sup> The statute required that these regulations be promulgated by Nov. 11, 1974. Acts of 1974, c. 818, § 3. As this chapter was going to press the Commissioner of the DNR acted to fulfill this directive. "Regulations Under the Wetlands Protection Act, General Laws Chapter 131, Section 40" were filed with the Secretary of State on Nov. 11, 1974, and were published on Nov. 18, 1974.

§18.9. <sup>1</sup> Acts of 1974, c. 842, adding G.L. c. 131, § 39A.

utilizes a regulatory format that in large part mirrors that prescribed in section 40 of chapter 131 for the case-by-case review of wetlands project proposals. As is the case in the section 40 wetlands procedure, the Berkshire mountains statute vests primary regulatory responsibility in the municipality, with the DNR being empowered to review local actions on a given land use development application. A three-step procedure must be followed before section 39A becomes effective to regulate land use in a given Berkshire municipality. Municipalities must first "accept" the statute and "designate" an agency (termed the hearing authority)<sup>2</sup> to administer it. The hearing authority must then prepare, and the municipality adopt, a map or text identifying those areas to be subject to the mountain protection statute. As a final prerequisite, it is necessary that the hearing authority adopt rules and regulations by which it will implement the statute.

Section 39A contemplates that municipalities within Berkshire County shall be able to regulate the development of "mountain regions" within their territorial limits. The "mountain regions" to be subject to this regulation are generally defined as those land areas which have elevations higher than standard "base elevations" specified in the statute for six named river watersheds.<sup>3</sup> The hearing authorities are to use these standard base elevations as guidelines for setting the boundaries of the areas to be regulated under section 39A: the hearing authority may use the base levels as stated, may enlarge the scope of regulation to include areas below the specified base elevations, or may reduce the range of protection by exempting certain areas above the base elevation. Once tentative boundaries for a mountain region have been identified and set by a hearing authority, they must undergo a public commentary procedure that includes a public hearing. Within twenty-one days of this hearing, the hearing authority must prepare and submit to the city council or town meeting a map or text delineating the mountain region boundaries. After such boundaries have been submitted to it by the hearing authority, or if the hearing authority does not submit such boundaries within twenty-one days of the public hearing,<sup>4</sup> the city council or town meeting may adopt, reject, or amend and adopt<sup>5</sup> final boundaries for

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<sup>2</sup> The statute defines "hearing authority" as the conservation commission or, if none, the board of selectmen in a town or the mayor in a city.

<sup>3</sup> Base elevations ranging from 1500 to 1800 feet above sea level are fixed for the watersheds of the Farmington, Housatonic, Westfield, Deerfield, Hudson and Hoosic Rivers.

<sup>4</sup> Presumably in such instances the city council or town meeting will use mountain-region delineations which were the subject of the public meeting.

<sup>5</sup> The city council or town meeting may also amend or repeal mountain region boundaries that have been in effect.

mountain regions to be regulated under section 39A.<sup>6</sup> Before boundaries thus adopted become effective, it is necessary that they be filed with the municipal clerk and be recorded in the Berkshire County Registry of Deeds, and that the hearing authority, after public hearing and DNR approval, promulgate rules and regulations in accordance with which it will administer the section 39A program within the region.<sup>7</sup>

Once it has precipitated the designation of a mountain region and has promulgated rules and regulations to implement section 39A, the hearing authority thereupon becomes responsible for regulating almost all development in the designated area.<sup>8</sup> The section 39A procedures for such regulation closely parallel those discussed in §18.7 *supra* with respect to the regulation of wetlands under section 40. No work affecting land may be lawfully carried out within an identified mountain region unless the person proposing to do such work has satisfied certain filing requirements and has received, and complied with all conditions specified in, an order authorizing such work. As is the case with the section 40 wetlands procedures, the process of obtaining a section 39A order commences with the filing of a "notice of intent" with the hearing authority, the DNR and the DPW. Section 39A requires that all local clearances necessary for the proposed activity must be obtained before the notice of intent may be filed.<sup>9</sup> Within twenty-one days of the receipt of this notice, the hearing authority must hold a public hearing on the proposed activity. Within twenty-one days of this hearing, the hearing authority must issue a written order imposing such conditions as it deems necessary to prevent the proposed activity from adversely affecting various resource values.<sup>10</sup> To carry out any of the duties imposed by section 39A, hearing authorities are empowered to enter on to privately-owned lands.

Following the format of section 40, section 39A provides a procedure whereby a project applicant, the DNR, or a person aggrieved by the hearing authority's action or inaction in a given section 39A mat-

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<sup>6</sup> The hearing authority must send a map or text delineating the boundaries of adopted mountain regions to the DNR. The statute does not state that failure to send such boundaries to the DNR would preclude implementation or enforcement of the statute. See note 7 *infra* & accompanying text.

<sup>7</sup> Acts of 1974, c. 842, § 2.

<sup>8</sup> Some activities are exempt from § 39A. See notes 23-24 *infra* & accompanying text.

<sup>9</sup> The § 39A requirement is that *all* local clearances be obtained before the notice of intent may be filed. A similar provision in § 40 is more flexible. Before filing a § 40 wetlands notice of intent the applicant must have obtained all local clearances which were *obtainable* at the time the notice of intent was filed. See § 18.8 n.12 *supra*.

<sup>10</sup> Section 39A orders may impose conditions necessary to protect water supplies, "to prevent pollution and erosion, to control flooding, and to preserve the natural scenic qualities of the environment." G.L. c. 131, § 39A. The inclusion of the erosion control and scenic preservation standards make the scope of regulation under § 39A much broader than that provided for wetlands regulation under § 40. See § 18.8 n.17 *supra*.



ter may bring about a review thereof by the DNR.<sup>11</sup> Section 39A also requires that requests<sup>12</sup> for DNR review be filed<sup>13</sup> within ten days of specified dates: the date upon which the hearing authority issues its order; the last date by which the hearing authority should have held a hearing on a notice of intent;<sup>14</sup> or the last date by which the local authority, having held a public hearing, should have issued its order.<sup>15</sup> Within seventy-two<sup>16</sup> days of the receipt of such a request, the DNR must issue a written order that will supersede the prior local order and which may impose such conditions as the DNR deems necessary<sup>17</sup> to protect various resource values.<sup>18</sup> Persons aggrieved by a DNR order thus issued may then seek judicial review pursuant to the provisions of the state Administrative Procedure Act.<sup>19</sup>

Before work may be undertaken pursuant to an order issued by a hearing authority or, if appealed, by the DNR, the order must be recorded in the Berkshire County Registry of Deeds. If an applicant fails to begin the proposed activity within one year of the date an order is issued, the project is deemed abandoned and the order expired. In special circumstances, the agency that issued the order, upon request of the applicant, may grant an extension of the order.<sup>20</sup>

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<sup>11</sup> The statute expressly allows for DNR review of a hearing authority's failure to act. But the language used in the section is not clear as to the extent of the DNR's review power over all local actions. It states that the DNR may be requested to determine "if conditions should be imposed on the proposed activity" to protect the resource values listed in note 10 *supra*. G.L. c. 131, § 39A (emphasis added). While it is arguable that this phrasing would permit DNR review of a hearing authority's decision to issue an order directing that no activity be done, or to issue an order that imposed no conditions, it is not clear whether the statute admits of a DNR review directed at *changing* the conditions that have been specified in a local order. The language in the statute describing the DNR's exercise of this review role is not particularly helpful in resolving this question. It merely states that the DNR may issue an order "imposing conditions."

<sup>12</sup> Within thirty days of the filing of a request for DNR review, the DNR must notify the person filing such a request of any defects in the request itself.

<sup>13</sup> The statute requires that the notice be sent by certified mail to the DNR, to the hearing authority, and, if the party requesting DNR review is not the applicant for the § 39A order, to the applicant.

<sup>14</sup> The request for DNR review must be filed within thirty-one days of the filing of the notice of intent.

<sup>15</sup> The request for DNR review must be filed within thirty-one days of the public hearing.

<sup>16</sup> By contrast, the DNR is required to issue a § 40 wetlands order within seventy days of the receipt of a request for review.

<sup>17</sup> To carry out the provisions of § 39A, the DNR is authorized to make entry upon privately-owned land. See § 18.8 n.19 *supra* & accompanying text.

<sup>18</sup> See note 10 *supra*.

<sup>19</sup> G.L. c. 30A.

<sup>20</sup> The language of the statute is imprecise on the maximum length of time for which such extensions may be made. It states that the agency which issued the order "may grant two extensions of the order for a period no longer than one year." G.L. c. 131, § 39A. Two constructions are possible: either the agency may grant extensions totaling two years by issuing two successive one-year extensions, or the agency may grant two extensions, the combined total of which may not exceed one year.

A section 39A order may be suspended or revoked by the agency that issued it if it finds, after notice and hearing, that the applicant has not complied with the order's conditions. The effect of this provision, which is not found in the section 40 wetlands procedure, may not be circumvented by sale of such land to a third party: persons purchasing land upon which an activity has been or is being done in violation of section 39A or any order issued thereunder may be compelled to comply with the order or to restore the site to the condition that existed prior to the time the violation first occurred. Violations of section 39A may be restrained or remedied by courts having equity jurisdiction<sup>21</sup> and are punishable by criminal penalties including fines and imprisonment. Upon completion of any activity authorized by a section 39A order, the applicant may request that the hearing authority issue a "certificate of compliance" indicating that the activity has been completed in conformance with the order and any conditions specified therein.<sup>22</sup> Such certificates may also be recorded in the Registry of Deeds. This provision, presumably intended to limit actions brought to remedy alleged violations of section 39A, is not found in the section 40 wetlands act. Section 39A does not expressly state what means should be used to compel a hearing authority to issue such certificates.

The provisions of section 39A are inapplicable to the following activities: the use of land for certain timber production purposes;<sup>23</sup> activities subject to regulation under section 40; certain activities relating to utilities; or to uses of land that were in existence, had been approved, or had been applied for prior to August 14, 1974, the date that section 39A became effective.<sup>24</sup>

**§18.10. Martha's Vineyard Commission: Land use control by regulating development of critical areas and developments of regional impact.** The island of Martha's Vineyard, off the southeast coast of the Commonwealth, was the subject of the second select land use control measure enacted by the legislature during the 1974 Survey year. Chapter 637 of the Acts of 1974, a special act that became

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<sup>21</sup> These remedial actions may be brought by the attorney general, by the DNR, by a municipality, by an owner or occupant of land which may be affected by the alleged violation, or pursuant to the provisions of G.L. c. 214, § 7A by ten citizens.

<sup>22</sup> Section 39A specifies that such certificates are to be issued by the hearing authority. Thus, the local hearing authority will be determining compliance with orders which it has issued as well as with orders issued by the DNR.

<sup>23</sup> Timber production activities done in compliance with G.L. c. 132, §§ 40-46 are exempt.

<sup>24</sup> Acts of 1974, c. 842, § 3. As is discussed above, the § 39A regulatory system does not automatically become effective in a Berkshire municipality. This provision dealing with uses in existence on the effective date of § 39A does not address the problem presented by uses that come into existence in the interval between the effective date of § 39A and the date upon which the regulatory program which it authorizes is implemented in a municipality.

effective on July 27, 1974, creates a Martha's Vineyard Commission (the Commission), a governmental entity empowered to administer a program to control land use in a manner best calculated to preserve the unique resources and economic vitality of that island. To this end the Commission is given regional planning responsibilities<sup>1</sup> and, more significantly, is given broad powers to ensure that its planning determinations are implemented within the several Martha's Vineyard municipalities. The Commission's powers are to be implemented, and the objectives of chapter 637 achieved, through the operation of two separate but interrelated forms of land use controls. First, the regulation of development in areas specifically earmarked for protection, and second, the regulation of types of development projects which because of their size or nature are likely to have impacts affecting more than just the one municipality in which they are to be sited. The areas to be subject to the first form of regulation are termed "districts of critical planning concern." The development activities subject to the second form of regulation are termed "developments of regional impact." These two controls for the most part will utilize land regulatory powers presently available to municipalities under Massachusetts law and may, at a future date, be integrated with a similar, federally-administered land use control scheme that has been proposed in Congress.

The land use controls of chapter 637 are not self-executing, but must be developed and implemented by the Commission. To facilitate this, chapter 637 imposes a temporary moratorium on the issuance of any municipal approval required for land development activity. During the period of this moratorium, such approvals<sup>2</sup> may not be issued except for: activities that will result in a land use not appreciably different from that to which a site is currently devoted; essential public activities; activities necessary to alleviate unnecessary and substantial hardship; certain transfers in land title; and, subject to certain limitations, the construction of single family residences.<sup>3</sup>

Chapter 637 sets forth in broad terms the considerations that are to be taken into account by the Commission in developing its land use control schemes. For example, it states that an area may be designated

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§18.10. <sup>1</sup> The Commission is to assume the powers and duties of the Dukes County Planning and Economic Development Commission which was created by Acts of 1966, c. 690. Acts of 1974, c. 637, § 18.

<sup>2</sup> During the period of the moratorium the planning boards of the various municipalities on the island may continue to evaluate certain subdivision plans submitted to them. Acts of 1974, c. 637, § 7.

<sup>3</sup> Acts of 1974, c. 637, §§ 7(a)-(f). The statute specifies that the Commission shall have been fully organized by Dec. 31, 1974. Id. § 2. The moratorium is to continue until one year after the Commission has been organized or until forty-five days after the Commission's standards and criteria have been approved by the state. Id. § 7. See note 6 *infra*.

as a district of critical planning concern if it can be shown to be an area whose unique resources make it significant from a regional or state-wide perspective, an area having physical characteristics that make it unsuited for intense development, or an area that is or will be significantly related to a major public facility.<sup>4</sup> A similarly broad description is given for the types of activities that are to be regulated as developments of regional impact. The identification of activities that are to be classified as developments of regional impact is to be made with a view towards the extent to which the siting, size, effects, purpose, public-service requirements, and other factors cause it to have an impact on more than just the community in which it is to be located.<sup>5</sup> By July 27, 1975, the Commission is to prepare and submit for state approval standards and criteria by which these broad considerations may be applied to regulate specific land use proposals on the island.<sup>6</sup> Once approved by the state, these standards and criteria are to be binding upon every municipal agency having authority in matters related to land use.<sup>7</sup>

The procedure by which the Commission's standards and criteria will be used to identify and protect districts of critical environmental concern commences with the "nomination" of areas for such designation.<sup>8</sup> Within forty-five days the Commission must indicate in writing whether or not it "accepts" the nomination.<sup>9</sup> Within sixty days of accepting a nomination the Commission must indicate in writing whether or not it has decided to "designate" the area as a district of critical planning concern.<sup>10</sup> As part of any district designation, the Commission must also issue guidelines specifying various environmental considerations that should be addressed by municipal agencies processing applications for development within the district.<sup>11</sup> Within three months of a district designation, the municipality must promul-

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<sup>4</sup> Acts of 1974, c. 637, § 9.

<sup>5</sup> Id. § 13.

<sup>6</sup> The Secretary of Communities and Development, with the concurrence of such other cabinet members as the governor may designate, is to review and approve, disapprove, or amend and approve the standards and criteria submitted by the Commission. The Secretary must complete this review within forty-five days of receiving the Commission's standards and criteria. Acts of 1974, c. 637, § 5.

<sup>7</sup> Acts of 1974, c. 637, § 5.

<sup>8</sup> Id. § 9. Nominations may be made by the Commission, by various municipal agencies, and by twenty-five or more taxpayers from any town on the island. Initial nominations may not be submitted until July 27, 1975, or until the state has approved the Commission's standards and criteria, whichever occurs first.

<sup>9</sup> Acts of 1974, c. 637, § 9. The Commission may consolidate the nominations of contiguous areas.

<sup>10</sup> Acts of 1974, c. 637, § 9. With limited exceptions, no municipal agency may issue a permit for land development in an area for which a nomination has been accepted. Id. § 10.

<sup>11</sup> Id. § 9.

gate regulations by which its agencies are to ensure that land development activity will not be carried out in the district except in conformance with the purposes of the district designation and the guidelines issued therewith. In the event that the municipality fails to promulgate such regulations within this time, or promulgates regulations that do not adequately comply with the guidelines, the Commission may itself adopt regulations regulating development in the district.<sup>12</sup> Regulations thus adopted by the Commission are to be administered and enforced by the appropriate municipal agency. Any applicant for a municipal permit to develop land in a designated district must bear the burden of proof that all environmental considerations specified in the Commission's guidelines have been adhered to.<sup>13</sup>

A much more direct procedure is to be used in regulating developments of regional impact. Once approved by the state, the Commission's standards and criteria for regulating such developments are immediately binding upon municipal agencies having jurisdiction in matters related to land development.<sup>14</sup> Municipal agencies receiving applications for land development activities must determine whether or not the proposed activity is a development of regional impact as defined in the Commission's standards and criteria. Upon determining that a proposed activity would constitute such a development, the municipality must immediately refer the application to the Commission<sup>15</sup> and may not act favorably thereon until so authorized by the Commission.<sup>16</sup> The Commission may permit a municipal agency to act favorably on applications for a development of regional impact only if it finds that the social, economic and environmental benefits of the project will outweigh any detriments that will be caused thereby, that the project will not impede local or regional growth plans, that the project is consistent with local and regional social objectives, and, if the project is to be located in an area that has already been designated as a district of critical planning concern, that it is consistent with regulations promulgated to guide development in that area.<sup>17</sup> In permitting a municipality to act favorably upon an application for a development of regional impact, the Commission may also impose such conditions as it deems necessary to minimize economic, social or environmental damage.<sup>18</sup>

Several features of chapter 637 and its procedures are worthy of note. First, the statute requires that certain actions be undertaken only

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<sup>12</sup> *Id.* § 11.

<sup>13</sup> *Id.* § 9.

<sup>14</sup> *Id.* § 14.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* §§ 15, 17.

<sup>17</sup> *Id.* § 15.

<sup>18</sup> *Id.* § 17.

after public notice and hearing.<sup>19</sup> Such opportunity for public comment must be made incident to the designation of,<sup>20</sup> termination of designation of,<sup>21</sup> and adoption of regulations to control developments in<sup>22</sup> districts of critical planning concern, as well as the review by the Commission of applications for developments of regional impact.<sup>23</sup> Curiously, no such opportunity for public comment is required as part of the process by which the Commission prepares, and the state approves, the standards and criteria that are to serve as the basis for the chapter 637 land use control program.<sup>24</sup>

One of the most interesting aspects of chapter 637 is its reliance upon a regional governmental entity, the Commission, as the principal actor in land use regulation. Although it shifts control over land use from a local to a regional entity, the statute makes it plain that the source of land use control authority is still to arise primarily from legal mechanisms traditionally exercised on the local government level. In this regard, chapter 637 specifically states that the regulations adopted by the Commission for the protection of districts of critical planning concern and for the regulation of developments of regional impact may utilize powers conferred upon municipalities by zoning, subdivision control, wetlands protection, and other statutes.<sup>25</sup> However, in instances where the Commission finds that local ordinances or by-laws do not furnish sufficient authority to achieve the purposes of the Act, it may promulgate regulations or impose conditions that are different in scope and magnitude from such local ordinances and by-laws.<sup>26</sup>

The statute also requires that the Commission provide written explanations of its reasons for taking certain actions. Such requirements arise when it accepts or rejects areas nominated for consideration as districts of critical planning concern,<sup>27</sup> when it designates or rescinds the designation of such districts,<sup>28</sup> and when it promulgates for a municipality regulations by which such districts are to be protected.<sup>29</sup> The Commission must also evidence its evaluation of the relative

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<sup>19</sup> These actions must generally conform to the procedures outlined in the Massachusetts Administrative Procedure Act for the promulgation of rules and regulations. See G.L. c. 30A, § 2.

<sup>20</sup> Acts of 1974, c. 637, § 9.

<sup>21</sup> *Id.* § 12.

<sup>22</sup> *Id.* § 11. This requirement applies both to municipalities promulgating such regulations and to the promulgation of regulations for municipalities by the Commission.

<sup>23</sup> Acts of 1974, c. 637, § 15.

<sup>24</sup> See *id.* § 8.

<sup>25</sup> *Id.* § 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 9.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 11.

merits of a proposed development of regional impact.<sup>30</sup> Finally, whenever it finds it necessary to promulgate regulations or impose conditions that exceed the scope and magnitude of existing by-laws or ordinances, it must document why continued utilization of the local ordinance or by-law would not be adequate to ensure that the objectives of chapter 637 were achieved.<sup>31</sup>

The statute provides that judicial review may be obtained by persons aggrieved by determinations of the Commission.<sup>32</sup>

At some time in the future, the land use control strategy of chapter 637 may be combined with a control program established under federal law. Since 1972, proposals to create a federal land trust encompassing Martha's Vineyard and the other islands in Nantucket Sound have been filed in Congress.<sup>33</sup> Several public hearings have been held on these proposals<sup>34</sup> and the matter seems to have reached some degree of public acceptance in the region.<sup>35</sup> A proposal submitted to Congress during 1974 called for the creation of three trust commissions—one each for Nantucket, Martha's Vineyard, and the Elizabeth Islands—and the establishment of a land regulatory system somewhat different from that created by chapter 637. Specifically, the federal proposal would create three general land use classifications.<sup>36</sup> Upon the effective date of the federal act all lands in the trust area would immediately be designated within one of these three land classifications. Although chapter 637 and this federal proposal are directed towards a common objective—the protection of fragile island resources—it remains to be seen whether the land use control mechanisms created by these two statutes can be effectively coordinated.

#### C. MISCELLANEOUS DEVELOPMENTS IN MASSACHUSETTS

**§18.11. Miscellaneous developments.** Two other developments during the 1974 Survey year warrant mention: the consolidation of state executive agencies having environmental protection jurisdiction and the imposition of restrictions on the use of steel jaw leghold traps.

*Environmental reorganization.* As a result of legislative action during

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<sup>30</sup> Id. § 16.

<sup>31</sup> Id. § 3.

<sup>32</sup> Id. § 18.

<sup>33</sup> For a discussion of the early proposals to create a special land use protection scheme in this area see Gifford, *An Island Trust: Leading Edges in Land-Use Laws*, 11 Harv. J. Legis. 417 (1974).

<sup>34</sup> See Hearings on S. 1929 Before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973).

<sup>35</sup> On March 14, 1974, the people of Martha's Vineyard voted to endorse the provisions of the state act. See Acts of 1974, c. 637, § 1(f).

<sup>36</sup> S. 3536, 93d Cong., 2d Sess. § 5 (1974).

the 1974 Survey year, all state executive agencies having jurisdiction in matters related to environmental protection are to be consolidated within a single executive office. Chapter 806 of the Acts of 1974 adds to the General Laws a new chapter 21A which gives the Secretary of Environmental Affairs authority over environmental agencies formerly located in the Departments of Agriculture, Natural Resources, Public Health, Public Safety, and Public Works, as well as several independent state agencies, such as the Metropolitan District Commission. To achieve some degree of functional cohesion, these agencies are assigned within five new departments.

*Leghold traps.* Chapter 796 of the Acts of 1974 amends chapter 131 of the General Laws by inserting therein a new section 80A which imposes restrictions upon the use of steel jaw leghold traps and other devices in the hunting of fur-bearing mammals. No person may set or use steel jaw leghold traps except upon land which they own or lease or, if set in water, in such a fashion to ensure that animals captured therein drown within a minimum length of time. Other devices may be used to trap fur-bearing mammals if they are capable of killing such animals at the moment of capture or of capturing them unhurt.

The Director of the Division of Fisheries and Game may promulgate rules and regulations whereby persons who have on their property severe animal problems may obtain special permits, for terms not to exceed ninety days, allowing them to use devices that cannot ensure that the animal will be captured without suffering. In no event may the Director issue such a permit for the use of a steel jaw leghold trap. Violations of section 80A are punishable by fine and imprisonment.

#### D. AIR POLLUTION CONTROL

**§18.12. Introduction.** The basic statutory and regulatory requirements for controlling air pollution under the federal Clean Air Act<sup>1</sup> (the Act) by the Massachusetts Department of Public Health (DPH) and the federal Environmental Protection Agency (EPA) were summarized in the *1972 Annual Survey of Massachusetts Law*.<sup>2</sup> The Act was significantly amended in regard to power plants and major fuel burning sources by the Energy Supply and Environmental Coordination Act of 1974.<sup>3</sup> Apart from those amendments, enforcement of existing air pollution regulatory requirements (principally contained in regulations promulgated by the DPH in conformity with the requirements of the Act and known collectively as the "State Implementation Plan" or SIP) has proceeded apace and there have been significant

§18.12. <sup>1</sup> 42 U.S.C. §§ 1857 et seq. (1970).

<sup>2</sup> 1972 Ann. Surv. Mass. Law §§ 21.2-.26, at 578-602.

<sup>3</sup> Pub. L. No. 93-319, 88 Stat. 246 (1974).



developments in areas forecasted in the earlier volume. Those developments include: the promulgation of transportation control plans for Boston and Springfield; the promulgation of regulations to maintain air quality standards once attained (including indirect source review); developments relating to the issue of non-degradation of air quality; and statutory and regulatory activity relating to variances from, and revisions to, the state implementation plan. This section will examine those developments and presupposes a working knowledge of the Act.<sup>4</sup>

**§18.13. Energy Supply and Environmental Coordination Act of 1974 (ESECA).** ESECA was formulated in response to the demands of the energy crisis and contains a number of energy-related provisions. Only those relating to the Clean Air Act will be discussed here.

ESECA directs the Federal Energy Administration (FEA) to order power plants to burn coal and authorizes it to order other "major fuel burning installations" to do the same, under conditions discussed below.<sup>1</sup> Orders can be either temporary (until June 30, 1975) or long-term, taking effect after June 30, 1975. Because of their limited significance, temporary orders will not be discussed here (indeed, FEA has not issued any such orders). Long-term orders can be issued if: (1) FEA finds that it is practicable for the facility to burn coal; coal and coal transportation facilities are available; and conversion will not impair reliability of service if the facility is a power plant; and (2) public participation procedures are observed. But such orders cannot become effective: (1) unless the Environmental Protection Agency (EPA) indicates that the facility can burn coal and meet all applicable State Implementation Plan (SIP) requirements, or (2) until the date EPA certifies as the earliest date the facility will be able to meet requirements established by EPA to assure that emissions from the facility, once it burns coal, can be controlled sufficiently so that they will not cause primary air quality standard violations.<sup>2</sup>

ESECA adds section 119 to the Clean Air Act.<sup>3</sup> The section authorizes EPA to grant air pollution sources temporary suspensions of fuel-related SIP requirements (until June 30, 1975) and to issue long-term compliance date extensions to such sources. Again, because of the temporal insignificance of the temporary suspensions, they will not be discussed here.<sup>4</sup> EPA is directed to issue compliance date ex-

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<sup>4</sup> A review of 1972 Ann. Surv. Mass. Law §§ 21.2-.26, at 578-602 may be helpful. See also Jorling, *The Federal Law of Air Pollution Control*, Federal Environmental Law 1058-1148 (Environ. Law Inst. 1974).

§18.13. <sup>1</sup> ESECA § 2(a), codified at 15 U.S.C. § 792(a).

<sup>2</sup> ESECA § 2(b)(3), codified at 15 U.S.C. § 792(b)(3).

<sup>3</sup> ESECA § 3, codified at 42 U.S.C. § 1857c-10.

<sup>4</sup> It is interesting to note that the three temporary suspensions issued by EPA to date have been in Massachusetts: to New England Power Company's Brayton Point and Salem plants and to the Montaup Electric Company's plant.

tensions to sources ordered to convert to coal by FEA or voluntarily beginning and completing conversions to coal within certain specified sets of dates.<sup>5</sup> Compliance date extensions can only be issued, however, if EPA finds that: (1) coal conforming to SIP requirements is not available to the facility; (2) the source can meet requirements established by EPA to assure that emissions from the facility, once it burns coal, can be controlled sufficiently to assure that they will not cause primary air quality standard violations ("primary standard conditions"); and (3) EPA has approved a plan and schedule to bring the source into compliance by December 31, 1978 with presently existing SIP requirements either by the provision of long-term supplies of coal conforming to SIP requirements or by emission controls.<sup>6</sup> In establishing primary standard conditions, EPA must observe public participation requirements and consult with state air pollution control agencies. Violations of primary standard conditions may be dealt with in accordance with EPA's normal enforcement mechanisms or by revocation of the compliance date extension.<sup>7</sup> It is unclear whether the citizen's suit provision of the Act applies to violations of primary standard or other compliance date extension provisions. There is a specific provision indicating that states are not barred from doing so, perhaps implying that all others are.<sup>8</sup> But such a standard or provision would appear to be an "emission standard or limitation" under the Act, which citizens are specifically authorized to enforce.<sup>9</sup>

EPA is authorized to allocate emission control devices suitable for sources receiving compliance date extensions to areas of greatest environmental need.<sup>10</sup> FEA is directed to allocate low sulfur fuel to areas of greatest environmental need in any allocation program it undertakes.<sup>11</sup>

Other provisions of ESECA are discussed below in regard to the particular air pollution regulations they affect.

**§18.14. Transportation control plans.<sup>1</sup>** National air quality stan-

<sup>5</sup> Section 119(c)(1), codified at 42 U.S.C. § 1857c-10(c)(1).

<sup>6</sup> Section 119(c)(2), codified at 42 U.S.C. § 1857c-10(c)(2).

<sup>7</sup> Section 119(d)(3), codified at 42 U.S.C. § 1857c-10(d)(3).

<sup>8</sup> Section 119(d)(4), codified at 42 U.S.C. § 1857c-10(d)(4).

<sup>9</sup> 42 U.S.C. § 1857h-2(a)(1) (1970).

<sup>10</sup> Section 119(e).

<sup>11</sup> ESECA § 7(a), codified at 15 U.S.C. § 793.

§18.14. <sup>1</sup> See Bracken, *Transportation Controls under the Clean Air Act: A Legal Analysis*, 15 B.C. Ind. & Com. L. Rev. 749 (1974). In addition, the prologue to a Federal Register notice of proposed rulemaking recounts in great detail the events leading to the promulgation by EPA of transportation control plans, as well as EPA's commentary on the various strategies that can be incorporated in transportation control plans. 38 Fed. Reg. 30626 (1973).

dards have been established for six air pollutants under the Act.<sup>2</sup> The Clean Air Act required the development either by the states or by EPA of state implementation plans to achieve these standards.<sup>3</sup> While most air pollutants are emitted from stationary sources, carbon monoxide (CO), hydrocarbons (HC) and photochemical oxidants (smog) are associated primarily with the automobile.<sup>4</sup> The achievement of standards for those three pollutants in some areas, therefore, is dependent on reducing emissions from automobiles, either by controlling emissions from them or by reducing the use of automobiles in those areas. Congress foresaw this necessity and dealt with it in providing that state implementation plans should contain such measures as are needed to assure the attainment and maintenance of the national standards, "including, but not limited to, land-use and transportation controls."<sup>5</sup>

Because of the complexity of transportation controls and the inexperience of EPA and the states with them, EPA sought to exercise its authority under the Act to defer until February 15, 1973 the required submission of transportation control plans (TCPs) by the states for those areas where TCPs were necessary to achieve national air quality standards, and to extend by two years the May 31, 1975 date by which the standards would otherwise have to be met in those areas.<sup>6</sup> EPA's actions in this regard, however, were successfully challenged and EPA was ordered to rescind the extensions and require affected states to immediately submit TCPs to achieve the national air quality standards

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<sup>2</sup> 40 C.F.R. Part 50 (1974). Air-quality standards are established at levels calculated to protect public health and welfare. See generally 1972 Ann. Surv. Mass. Law §§ 21.2, .4, at 578, 584.

<sup>3</sup> 42 U.S.C. § 1857c-5 (1970).

<sup>4</sup> Air-pollution sources are defined as stationary, mobile or indirect. Stationary sources are those sources situated at given locations that themselves emit pollutants (power plants, heavy manufacturing facilities, incinerators). Mobile sources are mobile sources that themselves emit pollutants (automobiles). Indirect sources (sometimes referred to as complex sources) are sources situated at given locations that themselves do not emit pollutants but attract mobile sources that do emit pollutants, e.g., sport arenas, shopping centers, parking lots. CO and HC are emitted directly from automobiles and smog is the product of HC and nitrogen oxides in the atmosphere under the influence of sunlight. Nationally, half of the HC emissions are from mobile sources and over 60% of CO emissions are from such sources. Hoffman, *National Inventory of Air Pollutant Emissions* (1968); Environmental Protection Agency, *Air Pollution Document 73*, at 3 (1970).

<sup>5</sup> 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

<sup>6</sup> The Act requires that SIPs meet national primary air quality standards within three years of their approval by EPA. 42 U.S.C. § 1857c-5(a)(2)(A) (1970). The Massachusetts SIP was approved on May 31, 1972, 37 Fed. Reg. 10872 (1972), and attainment of the primary air quality standards in Massachusetts is mandated by May 31, 1975. The Act, however, permits two-year extensions for the attainment of national standards in any area where EPA finds that the necessary technology is unavailable to meet such standards. 42 U.S.C. § 1857(e) (1970). For EPA's actions in this regard, see 37 Fed. Reg. 10842, 10845 (1972) and its approval of individual SIPs in 40 C.F.R. Part 52 (1974).

by May 31, 1975.<sup>7</sup> EPA took the required actions both in letters to the governors of the affected states and by notice in the *Federal Register*.<sup>8</sup> Since Springfield and Boston were among those areas for which a TCP was required<sup>9</sup> and Massachusetts did not submit TCPs for those areas, EPA proposed TCPs for Springfield and Boston on March 20 and July 2, 1973 respectively.<sup>10</sup> After hearings and the review of public comments, EPA promulgated final TCPs for those areas on November 7 and 8, 1973.<sup>11</sup>

In the Boston Intrastate Air Quality Control Region (the Boston AQCR) EPA calculated on the basis of air pollution data collected at various sites that a 69% reduction in HC and a 59% reduction in CO were necessary to achieve national standards.<sup>12</sup> EPA expected that approximately one-third and one-half, respectively, of those reductions would be achieved by 1975 as a result of progressively more effective air pollution controls required by the Act to be installed on post-1970 model year automobiles by their manufacturers.<sup>13</sup> This left reductions of 44% in HC and 25% of CO to be achieved by a TCP. To achieve these reductions EPA promulgated a TCP containing regulations of three basic types: (1) restrictions on emissions of HC from stationary sources; (2) requirements for the installation and maintenance of control equipment on automobiles to reduce emission of HC and CO; and (3) various measures to reduce vehicle miles travelled (VMT) and thus reduce emissions of HC and CO. All of these measures relate only to the Boston AQCR or portions thereof.

Restrictions on emissions of HC from stationary sources are not an innovation, but merely an extension of an existing state-wide HC control strategy to a greater variety of sources in the Boston AQCR.<sup>14</sup>

<sup>7</sup> *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 968, 4 E.R.C. 1945 (D.C. Cir. 1973).

<sup>8</sup> 38 Fed. Reg. 7323 (1973). See the transportation control measures contemplated as part of the control strategies designed to meet air quality standards, 40 C.F.R. § 51.1(n) (1974).

<sup>9</sup> 40 C.F.R. § 52.1128 (1974).

<sup>10</sup> 38 Fed. Reg. 7327, 17689 (1973).

<sup>11</sup> 38 Fed. Reg. 30827, 30960 (1973).

<sup>12</sup> 38 Fed. Reg. 30960 (1973). For updated figures, see 41 Fed. Reg. 8668 (1975).

<sup>13</sup> 38 Fed. Reg. 30960 (1973). The Act required that emissions of HC and CO from 1975 model year automobiles be reduced to 10% of their 1970 model year levels. 42 U.S.C. § 1857F-1(b)(1)(A) (1970). The reductions from this program credited to emission reductions in Boston in calculating the further reductions needed there to achieve standards, however, is questionable in view of subsequent deferral of the final date for compliance by automobile manufacturers with these requirements and greater experience with the operating results of the control technology currently in use on automobiles. EPA granted a one-year suspension of the 1975 standards for HC and CO on Apr. 23, 1973. 38 Fed. Reg. 10317 (1973). And Congress, in § 5 of the Energy Supply and Environmental Control Act, Pub. L. No. 93-319, 88 Stat. 246 (1974), suspended them for another two years.

<sup>14</sup> For a description of the HC control strategy contained in the original state implementation plans, see 1972 Ann. Surv. Mass. Law § 21.4, at 584.

The restrictions affect three types of sources: retail gasoline outlets, users of organic solvents, and sellers and users of paints and other architectural coatings.

Retail gasoline outlets are required to install a variety of vapor control and recovery devices designed to prevent the evaporation of petroleum products (and hence of HC) during transfer operations, both from delivery vehicles to storage tanks and from storage tanks to automobiles.<sup>15</sup> The TCP establishes a compliance schedule for the installation of these devices by March 1, 1976 or earlier.<sup>16</sup>

Emission limitations are established on the amount of HC that may be emitted by users of organic solvents, *i.e.*, solvents containing volatile HC.<sup>17</sup> Although no control technology is specified, the limitations can normally be met either by reformulating the solvent to eliminate its volatile organic component or by installing control devices, such as afterburners. The regulations establish a schedule for compliance with the limitations by May 31, 1975.<sup>18</sup> Of the known sources of HC emissions covered by this regulation, all but seven are presently operating in conformity with that compliance schedule. The remaining seven are under order by EPA to comply with the regulation.<sup>19</sup>

Finally, the use or sale of paint or other architectural coatings containing a photochemically reactive solvent in containers of one quart or greater capacity is forbidden after January 1, 1975.<sup>20</sup>

These controls account for a great deal of the HC emission reductions the TCP set out to achieve in the Boston AQCR, far more than accounted for by the more socially disruptive transportation controls.<sup>21</sup> The vapor recovery requirements relating to retail gasoline outlets have the further advantage of being energy conservation measures. The fuel they save from evaporating actually pays for the control devices over a fairly short period of time. In addition, they are relatively easy to enforce, since EPA already has a monitoring and surveillance program to assure compliance by retail gasoline outlets with unleaded gasoline requirements.<sup>22</sup> These factors are particularly noteworthy in view of growing scientific concern that smog is not just the product of local pollutants, but may be caused in part by pollut-

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<sup>15</sup> 40 C.F.R. § 52.1144 (1974), 38 Fed. Reg. 30969 (1973).

<sup>16</sup> 40 C.F.R. § 52.1147 (1974), 38 Fed. Reg. 30970 (1973), as amended, 39 Fed. Reg. 4881, 41252 (1974).

<sup>17</sup> 40 C.F.R. § 52.1145 (1974), 38 Fed. Reg. 30969 (1973). And see proposed amendments to the regulation, 41 Fed. Reg. 8677 (1975).

<sup>18</sup> 40 C.F.R. § 52.1147 (1974), 38 Fed. Reg. 30970 (1973). But note the exception provision in 40 C.F.R. § 52.1147(c) (1974).

<sup>19</sup> Data submitted by EPA's Region I Enforcement Division.

<sup>20</sup> 40 C.F.R. § 52.1146 (1974), 38 Fed. Reg. 30970 (1973).

<sup>21</sup> See generally 38 Fed. Reg. 30962-63 (1973) (emission reductions expected for the various controls).

<sup>22</sup> 40 C.F.R. Part 80 (1974). See also EPA, Region I press release, Dec. 17, 1974.

ants transported by air currents from relatively distant locations.<sup>23</sup> If this "transport" theory proves to be valid and the amount of pollutants transported to and from various locations can be quantified, the thrust of TCPs may have to be reexamined. If Boston's smog results from HC generated in Boston, Connecticut and New York, it makes sense to reduce Boston's smog by controls on HC emissions in all three locations. Indeed, it may be impossible to reduce smog sufficiently to meet the national standards in some areas on the East Coast without controls on HC emissions over a much broader area. Since emission limitations on stationary sources are relatively more effective in reducing HC emissions than limitations on mobile or indirect sources and are relatively easier to enforce, the next decade may see the widespread application of HC emission limitations on a broad variety of stationary sources throughout the East Coast urban corridor. This will not undercut the necessity of retaining VMT reduction strategies in some urban areas to address CO problems, since CO is very unstable and does not travel. But the extent and content of TCPs could conceivably be altered as HC controls on stationary sources become widespread.

In regard to the requirements relating to the installation and maintenance of pollution control devices on motor vehicles, it should be remembered that the Act required increasingly more stringent controls be installed in new motor vehicles by their manufacturers, leading to a 90% reduction in HC and CO emissions from 1975 model year cars as compared to 1970 model year cars.<sup>24</sup> For the cumulative reduction in pollutant emission expected from these controls to be fully realized, however, an inspection and maintenance program is necessary to detect and cure mechanical malfunctions, deterioration, and deliberate tampering.<sup>25</sup> Indeed, Congress recognized this in specifically providing in the Act a requirement that state implementation plans contain inspection and maintenance programs to the extent necessary to enforce applicable emission standards.<sup>26</sup> Since EPA counted heavily on the success of these controls for much of the HC and CO emission reduction needed in the Boston AQCR,<sup>27</sup> it required in the TCP that Massachusetts establish an inspection and maintenance program by August 1, 1976. The TCP contemplated a program

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<sup>23</sup> 3 National Academy of Sciences, National Academy of Engineering, Air Quality and Automobile Emission Control 76-90 (1974) (Senate Comm. on Pub. Works, Serial No. 93-24). Indeed, EPA appears to be acting in unstated accordance with this theory in its newly proposed amendments to the Boston TCP. See 41 Fed. Reg. 8668 (1975).

<sup>24</sup> See note 13 *supra* & accompanying text.

<sup>25</sup> Indeed, random sampling recently done by EPA reveals that in the absence of an effective inspection and maintenance program, those problems are more significant than EPA originally believed.

<sup>26</sup> 42 U.S.C. § 1857c-5(a)(2)(C) (1970).

<sup>27</sup> 38 Fed. Reg. 30960 (1973).

requiring inspection of all motor vehicles registered in the Boston AQCR twice a year to determine that they meet emission standards and forbidding their registration after that date in the event that they did not pass such inspections.<sup>28</sup> The Registry of Motor Vehicles is currently planning and implementing a program to meet these requirements in a manner compatible with the Commonwealth's existing safety inspection program.<sup>29</sup> Some of the factors discussed in the immediately preceding paragraph may lead to the imposition of such programs over a much larger area during the next several years.

Since the Act did not require the whole range of sophisticated pollution controls on pre-1975 model vehicles, further emission reductions are possible by requiring some or all of those controls on such earlier vehicles. The TCP requires vacuum spark disconnect devices, air bleed control devices, and oxidizing catalysts on all light duty and some medium duty motor vehicles registered in the Boston AQCR. The dates by which the devices are to be installed and the vehicles on which they are to be installed differ. But no affected vehicle is to be used or registered after the designated dates unless equipped with the requisite control equipment.<sup>30</sup> These requirements have been criticized as not cost effective in that the vehicles involved, being older model year vehicles, will be retired from the active vehicle fleet in short order in any event. Moreover, since older vehicles tend to be owned by the less affluent, the cost of compliance tends to fall disproportionately on those least able to pay. EPA has acknowledged this<sup>31</sup> and has made it known that it would not enforce the requirement relating to oxidizing catalysts, the most expensive of the retrofit devices.<sup>32</sup> Indeed, EPA has not taken steps to date to enforce the other retrofit requirements.

The remaining Boston TCP strategies are aimed at reducing VMT, thereby reducing both HC and CO emissions. The strategies are both disincentives to driving in single passenger motor vehicles and incentives to use other modes of transportation. The disincentives include an on-street parking ban; restrictions on the construction of new commercial parking facilities; an enforced vacancy rate during morning commuting hours in commercial parking facilities; reductions in parking spaces provided by employers for commuting employees; and

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<sup>28</sup> 40 C.F.R. § 52.1140 (1974), 38 Fed. Reg. 30967-68 (1973).

<sup>29</sup> Letter from Richard E. McLaughlin, Secretary of Public Safety, to John A.S. McGlennon, Regional Administrator, EPA, Region I, Nov. 1, 1974.

<sup>30</sup> The latest such date is May 31, 1977. 40 C.F.R. § 52.1141-43 (1974), 38 Fed. Reg. 30968-69 (1973). EPA presently proposes to defer all retrofit dates as long as possible. 41 Fed. Reg. 8677-78 (1975).

<sup>31</sup> 38 Fed. Reg. 17796 (1973).

<sup>32</sup> Address by EPA Administrator Russell Train, U.S. Conference of Mayors, San Diego, California, June 26, 1974. Current Developments, *Environ. Rep.*, June 28, 1974, at 243.

surcharges on commercial parking fees and tunnel tolls. The incentives include a state run carpool matching program, carpool/bus lane preference on some major arteries, and an augmentation of mass transit financing by surcharges collected.

An on-street parking ban is imposed in central parts of Boston and Cambridge between 7 a.m. and 10 a.m. on workdays after March 1, 1975. Residents of the area are allowed to park within one half mile of their residences. The ban is to be instituted by the Commonwealth and the political subdivisions having jurisdiction over the streets and roads in the affected area.<sup>33</sup> The apparent lack of success of Boston and Cambridge in enforcing their existing parking and traffic regulations leaves some question as to how successful these measures will prove to be in fact.

The TCP prohibits the construction of new commercial parking facilities in the same area if they would result in an increase in the parking spaces available in commercial parking facilities in that area over those available on October 15, 1973 (a slight increase in that number of spaces is allowed to reflect facilities in construction as of that date). Nor can any such facility be constructed without a permit from EPA or its designee. The permit cannot issue unless the permitting authority is satisfied that the proposed facility will not increase parking spaces beyond the prescribed amount and will not interfere with the attainment or maintenance of air quality standards.

The permit cannot be issued without public notice and opportunity for a hearing. Congress has subsequently evidenced its displeasure at such measures, requiring EPA to submit to it a study as to their necessity and "authorizing" EPA to suspend their effective date until January 1, 1975.<sup>34</sup> This regulation is not to be confused with similar regulation of parking facilities under the generally applicable indirect source regulations, discussed *infra*. The TCP also requires a reduction by March 1, 1975 of 40% in the total available parking spaces at commercial parking facilities in the Boston core area between 7 and 10 a.m. on workdays from the total amount of such spaces available on October 15, 1973. The city of Boston may designate the percentage reduction for particular facilities as long as the total reductions add up to the required 40%.<sup>35</sup> The TCP originally provided for a surcharge on commercial off-street parking spaces in that area and at Logan Airport, the proceeds to fund the MBTA,<sup>36</sup> but this provision

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<sup>33</sup> 40 C.F.R. § 52.1134 (1974), 38 Fed. Reg. 30964 (1973). EPA presently proposed to defer the full implementation of on-street parking bans in Boston until Mar. 1, 1977. 41 Fed. Reg. 8675 (1975).

<sup>34</sup> 40 C.F.R. § 52.1135(c) (1974), 38 Fed. Reg. 30965 (1973). ESECA § 4, codified at 42 U.S.C. §§ 1857c-5(c)(2)(A) & (C).

<sup>35</sup> 40 C.F.R. § 52.1136 (1974), 38 Fed. Reg. 30966 (1973). EPA proposes to revoke this requirement. 41 Fed. Reg. 8676 (1975).

<sup>36</sup> 40 C.F.R. §§ 52.1136(b)-(d) (1974), 38 Fed. Reg. 30966 (1973).



was later withdrawn by EPA.<sup>37</sup> A similar provision for an egress toll from Logan Airport was also withdrawn.<sup>38</sup>

Among the most controversial of the measures contained in the TCP is that requiring a reduction of 25% in the number of employee parking spaces provided by each employer of 50 or more in the Boston AQCR from the amount of such spaces provided by that employer on October 15, 1973.<sup>39</sup> The measure required the filing of action plans by affected employers by July 31, 1974, indicating how they would achieve the reduction, prevent overflow parking, and assist their employees in finding means of commuter transportation other than single passenger motor vehicles.<sup>40</sup> As of August 1974, a substantial number of employers subject to the regulation had not filed such action plans. After public warning that formal action would be taken against those not in compliance with the regulation, EPA initiated administrative action against 393 such employers by issuing them notices of violation, the first step in its enforcement procedures under the Act.<sup>41</sup> As of this writing, action plans have been filed by 1135 employers, including substantially all of the employers to whom notices of violation were issued.<sup>42</sup>

One of the criticisms of the regulation is that it allows no leeway for employers in particularly unfavorable situations, *e.g.*, isolated from mass transit with employees from sufficiently divergent directions to make carpooling impractical. EPA has indicated that it would administer the regulation in a manner that would take such situations into account, and that it would eventually propose an amendment adding a hardship section to the regulation to provide relief in such cases.<sup>43</sup> It appears from subsequent announcements that EPA may couple this seeming relaxation in the requirements of the regulation with an expansion of the scope of the regulation to require the reduction in parking spaces provided to students by educational institutions and to

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<sup>37</sup> 39 Fed. Reg. 1849 (1974). The proposed Energy Emergency Act reported out of House Committee on Interstate and Foreign Commerce on Dec. 10, 1973, contained a provision forbidding the imposition of such surcharges without prior congressional approval. Although the Act was not passed, for unrelated reasons, EPA took the provision as firm congressional guidance on the issue. Congress definitely ruled out parking surcharges or taxes in § 4 of the Energy Supply and Environmental Coordination Act of 1974, codified at 42 U.S.C. § 1857c-5(c)(2)(B), although it did ask EPA to submit a study on the necessity of parking surcharges. *Id.* § 1857c-5(c)(2)(A).

<sup>38</sup> 40 C.F.R. § 52.1137 (1974), 38 Fed. Reg. 30966 (1973). For the revocation, see 39 Fed. Reg. 1843 (1974). The reasons for revocation are the same as set forth in note 37 *supra*.

<sup>39</sup> 40 C.F.R. §§ 52.1135(g)-(l) (1974), 38 Fed. Reg. 30965-66 (1973).

<sup>40</sup> *Id.*

<sup>41</sup> EPA press release, August 13, 1974. For a description of EPA's enforcement procedures and remedies, see 42 U.S.C. § 1857c-8 (1974); Miller, *Environmental Law*, 1972 Ann. Surv. Mass. Law § 21.6, at 597.

<sup>42</sup> Data supplied by EPA's Region I Air Branch.

<sup>43</sup> Quincy Patriot Ledger, June 14, 1974, at 3, col. 2; see also Boston Globe, Sept. 7, 1974, at 1, col. 4. See also *South Terminal Corp. v. EPA*, 504 F.2d 646, 659, 6 E.R.C. 2025 (1st Cir. 1974).

require employers and educational institutions not supplying parking spaces to develop, submit to EPA, and implement action plans to reduce the dependence of their employees and students on commuting by single passenger motor vehicles by 25%.<sup>44</sup>

To assist affected employees to commute by carpool or mass transit, the TCP required the Commonwealth to establish a computerized carpool matching system (in the absence of a comparable privately operated system) capable of identifying and servicing employees affected by the TCP employee parking space limitations.<sup>45</sup> It also required the Commonwealth to establish exclusive carpool/bus lanes on Interstate 93 during peak commuter hours and to study the feasibility of establishing programs to favor carpools and buses on other major arteries.<sup>46</sup>

The controversy over the Boston TCP is focused primarily on the strategies designed to reduce automobile use. The controversy would in all likelihood be less intense if the TCP also provided for alternate modes of transportation, such as the expansion of mass transit, which would reduce dependence on the automobile. The long lead time involved in mass transit expansion, however, makes it unlikely that such measures could be implemented in time to meet the statutory attainment date for the air quality standards. Mass transit expansion by the purchase of more buses is an exception. Even this exception is unavailable, however, under EPA's interpretation of its powers under the Act.<sup>47</sup> Although not fully articulated, EPA's position appears to be that its regulatory jurisdiction under the Act is limited to requiring direct or indirect sources of air pollution to reduce emissions. All of the strategies in the TCP can be justified on this basis. The inspection and maintenance regulation, for instance, requires the state, as the owner of streets and highways within the Boston AQCR (indirect sources), to reduce emissions from those sources by refusing access to them by automobiles registered in the area without properly maintained air pollution control devices. EPA would contend that mandating mass transit improvements or expansion, however beneficial in reducing air

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<sup>44</sup> Boston Globe, Oct. 1, 1974, at 1, col. 1. Indeed, EPA presently proposes to abandon its parking space reduction strategy in favor of requirements that employers and schools reduce the number of their single passenger commuters by 25% regardless of whether they supply parking. This would be coupled with a variance provision. 41 Fed. Reg. 8679-80 (1975).

<sup>45</sup> 40 C.F.R. § 52.1138 (1974), 38 Fed. Reg. 30966-67 (1973). For proposed amendments, see 41 Fed. Reg. 8675-78 (1975).

<sup>46</sup> 40 C.F.R. § 52.1139 (1974), 38 Fed. Reg. 30967 (1973). For proposed amendments, see 41 Fed. Reg. 8676 (1975). Strangely enough Congress has expressed mild displeasure even with these mild, seemingly beneficial measures, requiring EPA to submit a study on their necessity and to hold public hearings in the area affected before imposing them. ESECA § 4, 42 U.S.C. §§ 1857c-5(c)(2)(A) & (E).

<sup>47</sup> EPA Office of General Counsel, Memorandum of Law regarding Legal Authority to Promulgate and Enforce Transportation Controls (Feb. 28, 1973).

pollution, cannot be conveniently structured as a requirement that the owner or operator of an air pollution source take steps to reduce emissions from that source. But it would appear that a provision requiring the state to reduce emissions by providing alternative means of transportation could be structured consistently with EPA's existing regulations. EPA's interpretation appears to be a rather conservative view of its broad statutory mandate. The Act required state implementation plans to include: "emission limitations, schedules, and timetables for compliance with such limitations, and *such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standards, including, but not limited to land-use and transportation controls.*"<sup>48</sup> There is nothing in the section suggesting that land use or transportation controls were limited to controls on emission sources. Even if there were, the italicized language above would appear to be broad enough to justify requiring mass transit improvement or expansion.

The Springfield TCP is far more simple and less controversial than the Boston TCP. It consists of an on-street parking ban between 7 and 10 a.m. on workdays in downtown Springfield;<sup>49</sup> a surcharge on commercial parking fees (since withdrawn);<sup>50</sup> a requirement that the state establish a computerized carpool matching program;<sup>51</sup> regulations for traffic flow improvement in the downtown area;<sup>52</sup> the closing of a portion of Main Street;<sup>53</sup> and a requirement that the state establish an inspection and maintenance program designed to assure the maintenance of automobile air pollution control devices.<sup>54</sup> Most of these strategies are similar to comparable requirements contained in the Boston TCP.

The Boston TCP was challenged in the First Circuit Court of Appeals in suits filed by nine petitioners that were eventually consolidated in *South Terminal Corp. v. EPA*.<sup>55</sup> These suits were but a small portion of nearly three hundred filed to challenge TCPs across the country.<sup>56</sup> As of the time this article was written, decisions had been rendered on these cases in the First, Second, Third and Fifth Cir-

<sup>48</sup> 42 U.S.C. § 1857c-5(a)(2)(B) (1970) (emphasis added). Indeed, the Senate Committee on Public Works indicated that it realized "some regions may have to establish new transportation programs and systems." S. Rep. No. 91-1196, 91st Cong. 2d Sess. 13 (1973).

<sup>49</sup> 40 C.F.R. § 52.1149 (1974), 38 Fed. Reg. 30830 (1973).

<sup>50</sup> 40 C.F.R. § 52.1150 (1974), 38 Fed. Reg. 30830 (1973), withdrawn, 39 Fed. Reg. 1849 (1974). See note 37 *supra*.

<sup>51</sup> 40 C.F.R. § 52.1151 (1974), 38 Fed. Reg. 30830-31 (1973).

<sup>52</sup> 40 C.F.R. § 52.1152 (1974), 38 Fed. Reg. 30831 (1973).

<sup>53</sup> 40 C.F.R. § 52.1153 (1974), 38 Fed. Reg. 30831 (1973).

<sup>54</sup> 40 C.F.R. § 52.1154 (1974), 38 Fed. Reg. 30831 (1973).

<sup>55</sup> 504 F.2d 646, 6 E.R.C. 2025 (1st Cir. 1974).

<sup>56</sup> Bracken, *supra* note 1, at 756.

cuits.<sup>57</sup> In all cases EPA's power to promulgate TCPs was upheld, although its technical data or conclusions were questioned in some instances.<sup>58</sup>

The petitioners in the *South Terminal* case raised a variety of constitutional, procedural and technical issues. The court found little merit in most of them.<sup>59</sup>

The most interesting procedural argument raised by the petitioners was that the public notice of the proposed TCP was insufficient under the Administrative Procedure Act.<sup>60</sup> This contention was based on the fact that the TCP as finally promulgated differed substantially from that originally proposed in the public notice in the *Federal Register*,

<sup>57</sup> *Pennsylvania v. EPA*, 500 F.2d 246, 6 E.R.C. 1769 (3d Cir. 1974); *Friends of the Earth v. EPA*, 499 F.2d 1118, 6 E.R.C. 1731 (2d Cir. 1974); *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 6 E.R.C. 1248 (5th Cir. 1974).

<sup>58</sup> *Pennsylvania v. EPA*, 500 F.2d 246, 6 E.R.C. 1769 (3d Cir. 1974), was perhaps the most significant of these opinions. The court in that case held that EPA could promulgate and enforce a TCP requiring a state to enforce substantive measures set forth in the TCP. 500 F.2d at 263. Both *South Terminal Corp. v. EPA*, 504 F.2d 646, 6 E.R.C. 2025 (1st Cir. 1974), and *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 6 E.R.C. 1248 (5th Cir. 1974), remanded technical issues to EPA for reconsideration.

<sup>59</sup> These contentions included: hearings held on the TCP prior to its promulgation should have been adjudicatory rather than legislative; an environmental impact statement should have been prepared pursuant to 42 U.S.C. § 4332(2)(C) (1970); EPA lacked statutory authority to promulgate regulations affecting off-street parking; some aspects of the parking management regulations were arbitrary and capricious; the Act was an unconstitutional delegation of authority to EPA; various of the regulations operated in an ex post facto manner; and the commerce power did not confer jurisdiction on the federal government to regulate local traffic. The court was concerned that the restrictions on employee parking spaces could operate in an arbitrary and capricious manner in particular instances, but provisionally approved them subject to the development of a variance provision that EPA represented in open court that it was developing. 504 F.2d at 682. It should be noted that such a variance provision is an unusual feature in regulations promulgated under the Act. In most instances, the formal process outlined in 42 U.S.C. § 1857c-5(f) (1970) must be followed to secure hardship relief from such regulatory requirements. *Natural Resources Defense Council v. EPA*, 473 F.2d 875, 5 E.R.C. 1879 (1st Cir. 1973). But that section applies only to state implementation plans affecting stationary or mobile sources. Parking facilities and other indirect sources do not fall into those two categories and can therefore be subject to less restrictive hardship exception provisions.

Finally, some of the petitioners attacked the regulation requiring control of the evaporation of hydrocarbons at retail gasoline outlets, contending that the required control technology was not commercially available. As noted above, EPA acknowledged confusion regarding this matter and promulgated a deferral of installation date for such devices in the Boston and other TCPs, requesting further comment on the devices involved, their efficiency and availability. In view of this, the court deferred further consideration of the matter until EPA had completed reinvestigating the availability of the required control technology. 504 F.2d at 682.

<sup>60</sup> 5 U.S.C. § 553(b)(3) (1970).

with no intervening notice being given of the changes.<sup>61</sup> EPA had indicated in the public notice, however, that in the event that the measures proposed were insufficient to achieve air quality standards or were not preferable to other measures in light of public comments received, EPA was considering other measures, which it listed.<sup>62</sup> The changes that occurred in the TCP between its proposal and final promulgation were a result of such comments received at hearings and in response to the public notice and flowed from the other measures alluded to by EPA in its proposal. Under these circumstances, the court held that the purposes of the public notice requirements had been well served and that ultimately "the plan seems a logical outgrowth of the hearing and related procedures."<sup>63</sup>

More serious was the petitioners' attack on the data base utilized by EPA in determining the extent of pollution reduction required to be achieved by the TCP to meet air quality standards. Since those standards provide limits that are not to be exceeded more than once a year,<sup>64</sup> the pollution reduction required to be achieved by the TCP is the difference between the second highest recorded levels for the affected pollutants and the standards established for those pollutants. The petitioners contended that the second highest readings for CO and HC were invalid for various technical reasons. The court found that the record was insufficient to demonstrate that EPA had adequately taken into account the technical objections raised by the petitioners. In fairness to EPA, the court noted that the petitioners had not raised the objections prior to their court challenge. Although under normal circumstances this might preclude the petitioners from raising the objections in the first instance on review, the TCP had such far reaching implications that the court determined that the objections nevertheless should be considered. At the same time, however, the court did not view itself as qualified to make determinations of the nature indicated and remanded the matter to EPA for further consideration. The court stayed final compliance with some of the controls contained in the TCP (although it did not stay interim plan-

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<sup>61</sup> 38 Fed. Reg. 17689 (1973). The VMT-reduction strategies contained in the original proposal included an on-street parking ban in the Boston core area, a \$5 maximum daily surcharge on off-street parking during business hours in the Boston core area and at Logan Airport; and a prohibition against using motor vehicles registered within the Rte. 128 perimeter one day out of five during periods of high pollution levels.

<sup>62</sup> 38 Fed. Reg. 376 (1973).

<sup>63</sup> 504 F.2d at 659, 6 E.R.C. at 2030. Indeed, a contrary holding would be a great disincentive against agencies taking public comments seriously. If proposed regulations had to be repropoed to incorporate changes suggested by public comment during public comment periods, regulations might never be finalized, but caught in a perpetual limbo of being constantly repropoed to incorporate new changes suggested by public comments after successive repropoals.

<sup>64</sup> 40 C.F.R. §§ 50.8, 50.9 (1974).

ning requirements contained in those controls). The court ordered EPA to hold additional public hearings within 60 days (by December 26, 1974) on its technical data base to resolve the questions raised by the petitioners and thereafter to affirm or modify its determinations of the emission reductions required to be achieved by the TCP. The court also ordered EPA to amend the TCP to provide for its periodic updating in response to changing pollutant emissions.<sup>65</sup> EPA secured a 60-day extension of the time limits contained in the order to enable it to secure and evaluate new data collected after the promulgation of the TCP. Thus, as of this writing, the ultimate fate of the TCP is still in the hands of the court although there are preliminary indications that the new data evaluated by EPA will sustain the TCP without significant modifications.<sup>66</sup>

The last word on the VMT reduction strategies affecting parking, however, may rest with Congress. In section 510 of EPA's fiscal 1975 appropriation bill, Congress provided that: "No part of any funds appropriated under this Act may be used by the Environmental Protection Agency to administer any program to tax, limit, or otherwise regulate parking facilities."<sup>67</sup> This provision does not remove the parking space related VMT reduction strategies from TCPs. It does not prevent states from administering such strategies. It does not prevent EPA from administering them after June 30, 1975, the end of the 1975 fiscal year. But the possibility of the provision's renewal in subsequent years casts doubt on the feasibility of such strategies in an EPA-administered TCP. Moreover, EPA may take the measure as congressional guidance on the matter, even if it is not renewed in future years.<sup>68</sup> Of course, if the Boston TCP is unable to achieve the air quality standards without implementing these strategies, more drastic or disruptive measures may eventually have to be imposed.

**§18.15. Maintenance strategies.** EPA's approval of the State Implementation Plans (SIPs) for all states was challenged in *Natural Resources Defense Council, Inc. v. EPA*<sup>1</sup> insofar as the SIPs did not provide for the maintenance of air quality standards once they were attained.

<sup>65</sup> 504 F.2d at 681-82, 6 E.R.C. at 2046-47. The regulations stayed were 40 C.F.R. §§ 52.1135, 52.1136 & 52.1144 (1974).

<sup>66</sup> EPA's recently proposed amendments to the Boston TCP do not represent a retreat from the existing TCP, although they do create a more workable structure. The technical support for the proposed amendments indicates that although the data underlying the original TCP may have been unverifiable technically, more refined data confirms the original estimate of the pollution problem and the consequent control needs. 41 Fed. Reg. 8668 et seq. (1975).

<sup>67</sup> Section 510 of the Agriculture-Environmental and Consumer Protection Appropriation Act, 1975, Pub. L. No. 93-563, § 510, 88 Stat. 1822 (Dec. 31, 1974).

<sup>68</sup> EPA has done this before. See note 37 supra & accompanying text.

§18.15. <sup>1</sup> 475 F.2d 968, 6 E.R.C. 1239 (D.C. Cir. 1973).

The Court of Appeals for the District of Columbia Circuit ruled in 1973 that the record was insufficient to determine whether the SIPs adequately provided for maintenance of standards. The court ordered EPA to review the SIPs and disapprove those which contained inadequate analysis of and provisions for the control of maintenance problems. Upon review, EPA determined that no SIP adequately dealt with maintenance and accordingly disapproved all SIPs to that extent.<sup>2</sup>

EPA then began to develop a strategy to assure maintenance of standards. It began with several aspects of the existing control scheme that indirectly limited the effects of growth on air quality.<sup>3</sup> One of these was a requirement that the SIPs provide for the prior review of new sources of air pollution and the prevention of their construction to the extent they would jeopardize the attainment or maintenance of air quality standards.<sup>4</sup> The Massachusetts SIP contains such a provision.<sup>5</sup> Such measures, however, address only direct sources of air pollution and are of little use in providing for maintenance of standards for CO, HC and smog, which are primarily emitted from automobiles.<sup>6</sup> EPA accordingly rounded out this measure by requiring that SIPs provide for the prior review of construction that would increase automobile traffic and the prevention of such construction to the extent that the increased traffic would jeopardize the attainment or maintenance of air quality standards. This measure is known as indirect source review and is discussed below in detail.<sup>7</sup>

But even these combined measures only require source by source review of large sources. As such, they are tools to analyze and control only a portion of a region's air quality maintenance problems. Accordingly, EPA has also required SIPs to provide strategies to deal with maintenance in a more comprehensive manner. It required the states to identify areas in which current air quality or projected growth may cause air quality standard violations within the next 10 years.<sup>8</sup> Massachusetts has identified metropolitan Lawrence/Haverhill, Boston,

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<sup>2</sup> 38 Fed. Reg. 6279 (1973).

<sup>3</sup> These included: (1) the requirement that SIPs contain procedures for review of new sources of air pollution and for the prevention of the construction of such sources if their emissions would prevent the attainment or maintenance of air quality standards, 40 C.F.R. § 51.18 (1974); (2) emission limitations on new sources promulgated pursuant to 42 U.S.C. § 1857c-6 (1970) (see 40 C.F.R. Part 60 (1974)); (3) emission limitations on new automobiles promulgated pursuant to 42 U.S.C. § 1857f-1 (1970) (see § 18.14 at note 13 supra); and (4) the inference of 42 U.S.C. § 1857c-5 (1970) that EPA requires the revision of SIPs if monitoring data subsequently demonstrates that they are inadequate to attain or maintain air quality standards.

<sup>4</sup> 40 C.F.R. § 51.18 (1974).

<sup>5</sup> Dep't of Pub. Health, Bureau of Air Quality Control, Regulation 2.

<sup>6</sup> See § 18.14 n.4 supra.

<sup>7</sup> 40 C.F.R. § 51.22 (1974).

<sup>8</sup> Id. § 51.12(e).

Worcester and Springfield as such areas and EPA plans to formally designate each as an air quality maintenance area (AQMA) in the near future.<sup>9</sup> Each state with an AQMA is required by June 18, 1975 to develop and submit to EPA an analysis of the impact of growth on air quality in the AQMA and such amendments to the SIPs as may be necessary to maintain air quality standards in the AQMA ("air quality maintenance plans").<sup>10</sup> It is likely that the submission date for these plans may be deferred for one year in recognition of their great complexity. The process is dynamic and must be repeated every 5 years.<sup>11</sup>

EPA's regulations do not indicate what types of measures should be incorporated into air quality maintenance plans. But non-binding guidelines suggest that adroit manipulation of traditional measures such as zoning codes might be appropriate to achieve controls on growth, if necessary.<sup>12</sup> If such measures were incorporated in the SIPs, they would, of course, become enforceable by EPA and private citizens, and amendments to them would not be possible without approval by EPA.<sup>13</sup> Such developments are by no means certain, but are possible. While the potential social and economic impact of such developments could dwarf that of the TCPs, they have received surprisingly little public attention. This may be due in part to the expectation that if air quality maintenance plans interject EPA too far into traditionally local concerns, Congress will act to restrain it.<sup>14</sup>

The indirect source review procedures offer some indication of the controls that may be developed as maintenance measures. Among the contentions of the plaintiffs in *Natural Resources Defense Council* was that EPA's approval of the SIPs was invalid insofar as the SIPs did not provide for review of new construction that might affect CO, HC and smog standards by increasing automobile traffic. The court agreed.<sup>15</sup> Acting pursuant to the resulting court order, EPA reviewed the SIPs, found them all deficient in that regard, and disapproved them to that extent.<sup>16</sup> EPA then amended its regulations to require that SIPs contain provisions for prior review of new indirect as well as direct sources of air pollution; published guidelines to assist the state in

<sup>9</sup> Conversations with the Chief of EPA's Air Quality Planning Section.

<sup>10</sup> 40 C.F.R. § 51.12(g) (1974).

<sup>11</sup> Id. §§ 51.12(e)(3) & (g)(3).

<sup>12</sup> "Guidelines for Air Quality Maintenance Planning and Analysis," Volumes 1-12, EPA.

<sup>13</sup> 42 U.S.C. §§ 1857c-5, 1857c-8, 1857h-2j (1970); *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875, 5 E.R.C. 1879 (1st Cir. 1973).

<sup>14</sup> As Congress has indicated its displeasure with EPA's attempts to impose parking taxes and roadways tolls and has prevented EPA for a time from regulating parking facilities. See § 18.14 n.37 *supra*.

<sup>15</sup> 475 F.2d at 970.

<sup>16</sup> 38 Fed. Reg. 6290 (1973).



drafting such provisions; allowed the states until August 15, 1973 to submit indirect source review procedures to it for approval; and, finally, on February 25, 1974, promulgated indirect source review procedures applicable in those states without approved procedures of their own.<sup>17</sup> Massachusetts did not do so and its SIP was accordingly disapproved to that extent. Since it has not subsequently submitted such procedures, the federal regulations apply. Those procedures require pre-construction approval by EPA of new parking facilities for more than 1,000 cars or modified parking facilities adding more than 500 parking spaces in any standard metropolitan statistical area (2,000 and 1,000 respectively outside any such area); moderate-sized airports; and new or modified highway sections with high anticipated traffic volumes.<sup>18</sup> No construction of such indirect sources is supposed to commence after December 31, 1974 without approval by EPA.<sup>19</sup> Construction of parking facilities cannot be approved if they would interfere with the attainment or maintenance of CO standards, and construction of airports and highways cannot be approved if they would interfere with the attainment or maintenance of any of the automobile-related standards. EPA's criteria for approving parking facilities include review of specified design details, such as the number and location of exits and entrances.<sup>20</sup> EPA may delegate its review and approval authority to state air pollution control agencies or other local agencies.<sup>21</sup> Massachusetts has requested such delegation.

Congress in the Emergency Energy Bill passed by both houses in December 1973 would have authorized EPA to suspend these requirements as they related to parking facilities until January 1, 1975. Although the bill did not become law (for unrelated reasons), EPA followed congressional guidance and suspended the implementation of those regulations until that date.<sup>22</sup> Subsequently, Congress prohibited EPA from administering the regulations as they relate to parking facilities until July 1, 1975.<sup>23</sup> Whether Congress will act to permanently remove EPA from jurisdiction over parking facilities remains to be seen.

Insofar as both the TCPs and the indirect source regulations contain provisions concerning new parking facilities, they have inevitably caused confusion as to their respective applicability. To clarify the potential conflict, EPA explained that TCP management regulations generally take precedence over indirect source regulations in regard

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<sup>17</sup> 40 C.F.R. § 52.22 (1974).

<sup>18</sup> *Id.* § 52.22(b) (2).

<sup>19</sup> *Id.* § 52.22(b) (3).

<sup>20</sup> *Id.* § 52.22(b) (4) (ii).

<sup>21</sup> *Id.* § 52.22(b) (14).

<sup>22</sup> 39 Fed. Reg. 1848 (1974).

<sup>23</sup> See § 18.14 n.37 *supra*.

to new parking facilities.<sup>24</sup> This delineation is logical in that the TCP parking management regulations are potentially the most restrictive of the two, requiring review of both HC and CO emissions rather than just of CO emissions, as is the case with indirect source regulations. Although EPA proposed to further integrate the two sets of regulations,<sup>25</sup> it was interrupted in doing so by court action on the Boston TCP<sup>26</sup> and the congressional action noted above<sup>27</sup> and it has proceeded no further in this regard.

**§18.16. Non-degradation.** EPA's approval of the State Implementation Plans (SIPs) for all states was challenged in *Sierra Club v. Ruckelshaus*<sup>1</sup> insofar as EPA had not required the plans to prevent the deterioration of existing air quality. The United States District Court for the District of Columbia, on the basis of both the stated purpose of the Clean Air Act<sup>2</sup> and its legislative history, held the state implementation plans were invalid insofar as they allowed "pollution levels of clean air to rise to the secondary standard level of pollution."<sup>3</sup> It ordered EPA to disapprove the plans to that extent and to promulgate regulations to prevent such degradation. Its decision was ultimately affirmed by an equally divided Supreme Court.

EPA accordingly disapproved the offending plans to the extent directed by the Court and published proposed sets of regulations to cure the deficiencies.<sup>4</sup> Since EPA felt that neither the Act nor the court order offered clear direction as to the type of regulatory scheme appropriate for preventing deterioration, its first proposal was in the unusual form of four alternative conceptual approaches, intended to focus discussion on conceptual issues. The proposed alternatives ranged from the establishment of a uniform incremental increase that would be allowed in pollution levels in any Air Quality Control Re-

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<sup>24</sup> 40 C.F.R. § 51.22(b)(15) (1974), 39 Fed. Reg. 25292 (1974). Indirect source regulations continue to apply to all new residential parking facilities, however, since such facilities are generally exempt from control in TCPs (see, e.g., 40 C.F.R. § 52.1135 (1974)) but are not exempt in the indirect source regulations.

<sup>25</sup> See 39 Fed. Regs. 30442, 30451 (1974).

<sup>26</sup> See § 18.14 n.55 *supra*.

<sup>27</sup> See § 18.14 n.37 *supra*.

§18.16. <sup>1</sup> 344 F. Supp. 253, 4 E.R.C. 1205 (D.D.C.), *aff'd*, 40 U.S.L.W. 2811, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd* by an equally divided Court, 412 U.S. 541, 5 E.R.C. 1417 (1973).

<sup>2</sup> 42 U.S.C. § 1857(b)(1) (1970). "To protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.* The Court indicated that "On its face, this language would appear to declare Congress' intent to improve the quality of the nation's air and to prevent deterioration of that air quality, no matter how presently pure that quality in some sections of the country happens to be." 344 F. Supp. at 255, 4 E.R.C. at 1206.

<sup>3</sup> 344 F. Supp. at 257, 4 E.R.C. at 1207.

<sup>4</sup> 39 Fed. Reg. 31000 (1974); 38 Fed. Reg. 18986 (1973); 37 Fed. Reg. 23836 (1972).

gion (AQCR) over such levels as they existed in 1972, to the designation of three categories of zones with different incremental increases allowed in pollution levels for each category of zone. All of the alternatives had the potential to significantly impact future economic growth and understandably resulted in a considerable amount of public comment.<sup>5</sup> The second set of proposed regulations was an elaboration on the zone concept which was ultimately adopted in the final regulations promulgated on December 5, 1974.<sup>6</sup>

Basically, the regulations create three zones, denominated Class I, Class II and Class III. In Class I areas very little degradation is allowed in air quality from that existing during 1974 (adjusted to reflect emissions from new sources approved prior to 1975 pursuant to new source review procedures in state implementation plans but not actually constructed prior to that time).<sup>7</sup> In Class II areas a moderate increase in pollutant levels is allowed.<sup>8</sup> The increase would allow a reasonable amount of new industry, as long as it is well planned and controlled, not of unusual size and not clustered in a small area. It would, however, preclude the introduction of new major sources of air pollution, such as a 1000 megawatt fossil fuel power plant.<sup>9</sup> In Class III areas increases in pollution levels are allowed up to the levels of the national air quality standards.<sup>10</sup>

All areas are initially designated as Class II by EPA.<sup>11</sup> States, however, may submit proposed redesignations in the class of any area to EPA for approval.<sup>12</sup> Approval is contingent on the state following specified public participation procedures, taking specified considerations into account in proposing the redesignation,<sup>13</sup> and undertaking

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<sup>5</sup> See 39 Fed. Reg. 31000 (1974).

<sup>6</sup> 40 C.F.R. § 52.21 (1974), 39 Fed. Reg. 42510 (1974).

<sup>7</sup> For particulate matter, an increase of 5 g/m in the annual geometric mean and 10 g/m in the 24 hour maximum. For sulfur dioxide, an increase of 2 g/m in the annual geometric mean, 5 g/m in the 24 hour maximum, and 3 g/m in the 3 hour maximum. 40 C.F.R. § 52.21(c)(2)(i) (1974), 39 Fed. Reg. 42515 (1974).

<sup>8</sup> For particulate matter, an increase of 10 g/m in the annual geometric mean and 30 g/m in the 24 hour maximum. For sulfur dioxide, an increase of 15 g/m in the annual geometric mean, 100 g/m in the 24 hour maximum, and 700 in the 3 hour maximum. 40 C.F.R. § 52.21(c)(2)(i) (1974), 39 Fed. Reg. 42515 (1974).

<sup>9</sup> See 39 Fed. Reg. 31004, 42510 (1974).

<sup>10</sup> 40 C.F.R. § 52.21(c)(2)(ii) (1974), 39 Fed. Reg. 42515 (1974).

<sup>11</sup> 40 C.F.R. § 52.21(c)(3)(i) (1974), 39 Fed. Reg. 42515 (1974).

<sup>12</sup> 40 C.F.R. § 52.21(c)(3)(ii) (1974), 39 Fed. Reg. 42515 (1974).

<sup>13</sup> 40 C.F.R. § 52.21(c)(3)(vi) (1974), 39 Fed. Reg. 42515 (1974). States must consider: (1) anticipated growth; (2) social, economic and environmental effects of the proposed redesignation on the area and other areas and states; and (3) impacts on national or regional interests. 40 C.F.R. § 52.21(c)(3)(ii)(d) (1974), 39 Fed. Reg. 42515 (1974). Slight additional requirements and procedures are indicated when federal or Indian lands are affected. 40 C.F.R. §§ 52.21(c)(3)(iii)-(v) (1974), 39 Fed. Reg. 42515 (1974).

the new source reviews discussed below.<sup>14</sup>

The construction of new heavy industry anywhere is precluded until EPA or the state has determined that: (1) emissions from the new source would not violate the increment of allowed increase in air pollution for the area in which the source would be located or in adjacent areas, and (2) the source will apply the best available technology to control emissions of particulate matter and sulfur dioxide.<sup>15</sup> Elaborate public participation procedures are required to be followed in making such determinations by either EPA or a state.<sup>16</sup>

It will be interesting to see whether these regulations will stand the test of their inevitable court challenge. It could be argued that they are not as restrictive as the court's decision suggested they should be.<sup>17</sup> They only prevent degradation of two pollutants, while EPA has set standards for six pollutants, and many other pollutants are constantly emitted. This would not appear to be in accordance with the initial conclusion of the court in *Sierra Club* that the Act precluded EPA from approving SIPs that allowed "pollution levels of clean air to rise to the secondary level of pollution."<sup>18</sup> Moreover, insofar as states reclassify areas as Class III, no protection against degradation has been added to the preexisting regulatory scheme since increases in pollution to the secondary standard level are allowed in Class III areas. Indeed, even the Class II designation allows what some might consider significant degradation.<sup>19</sup>

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<sup>14</sup> The requirement that a state undertake to do new source reviews prior to EPA's considering proposed redesignations of areas within the state, is a neat bureaucratic ploy by EPA that will be appreciated by students of environmental federalism. EPA has been relatively unsuccessful in persuading states to seek delegation of new source review authority under its New Source Performance Standards. 40 C.F.R. Part 60 (1974). This has left the Agency open to suspicions that it is not encouraging full state involvement in implementing the Clean Air Act. Moreover, the necessity of EPA conducting new source reviews has been a drain on its resources. The anti-degradation new source reviews appear to subsume and be more extensive than the New Source Performance Standards reviews and consequently to require the expenditure of greater resources. Few states will be able to continue resisting accepting delegation of new source reviews, since such delegation is a prerequisite for EPA approval of reclassification of areas and reclassification of at least one area in every state to Class III appears to be necessary if the state is to experience any significant economic growth or even host a significant new power plant.

<sup>15</sup> 40 C.F.R. § 52.21(d) (1974), 39 Fed. Reg. 42516 (1974).

<sup>16</sup> 40 C.F.R. § 52.21(e) (1974), 39 Fed. Reg. 42516-17 (1974).

<sup>17</sup> A variety of objections to the regulations by both environmentalists and industry are mentioned in the prologue to the regulations. Some of these will undoubtedly be urged in arguments to the courts. 39 Fed. Reg. 42510-13 (1974).

<sup>18</sup> 344 F. Supp. at 256, 4 E.R.C. at 1207.

<sup>19</sup> The whole concept of "significant" deterioration appears to be an artifice to avoid the full implications of the district court's opinion. The court nowhere suggested that significance be the touchstone of preventing degradation. But all of EPA's proposals have been in terms of significant degradation. It even entitled the prologues to the proposed and final regulations "Prevention of Significant Air Quality Deterioration."

Aside from the conceptual difficulties of establishing a strict anti-degradation standard and the resources and data required to implement such a standard,<sup>20</sup> it would impose constraints on economic growth that the present administration—or indeed any probable future administration—would not be willing to accept. Thus it is impossible for EPA to satisfy the environmentalists, the Court and the administration on the degradation issue and it is unlikely that it could wholly satisfy any one of them. The only way out for EPA is an amendment in the Act giving it specific direction on the issue. The administration has, in fact, submitted an amendment to eliminate the requirement of preventing the significant deterioration of air quality.<sup>21</sup> In the absence of such an amendment, further litigation appears inevitable. In the meantime, it is also likely that Massachusetts will seek to classify some areas as Class III and, as a precondition to such reclassification, will agree to assume new source review authority.

**§18.17. SIP revisions and variances.** State Implementation Plans (SIPs) may be revised from time to time by the states, but revisions require EPA approval.<sup>1</sup> EPA will approve a revision only when a state demonstrates that the SIP, as revised, will achieve national air quality standards by its statutory attainment date and that various procedural and public participation requirements have been met.<sup>2</sup>

Massachusetts submitted a number of revisions to EPA for approval during 1974. The most noteworthy were chapters 353, 494 and 499 of the Acts of 1974, submitted to EPA on August 9, 1974.<sup>3</sup>

Chapter 353, passed over the Governor's veto, would allow the burning of residual fuel oil with a sulfur content of 2.2% in the Berkshire Air Quality Control Region (AQCR). In his submission of chapter 353 to EPA, the Governor indicated his belief that fuel oil with a sulfur content higher than the 1% presently allowed<sup>4</sup> could be burned in the Berkshire AQCR under certain conditions without jeopardizing the attainment and maintenance of air quality standards. He noted,

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See note 4 *supra*. Most of the previous administrative statements on the issue quoted by the Court in support of its conclusion also made use of the term. But it should be recognized that there is a conceptual difference between preventing air quality degradation and preventing significant air quality degradation. The latter allows some and perhaps a considerable amount of new pollution and was arguably not contemplated in the Court's opinion.

<sup>20</sup> These difficulties are outlined in the prologues to both sets of proposed regulations and to the final regulations.

<sup>21</sup> 39 Fed. Reg. 42510 (1974).

§18.17. <sup>1</sup> 42 U.S.C. § 1857c-5(a)(3)(A) (1970). But see *Train v. Natural Resources Defense Council, Inc.*, —U.S.—, 43 U.S.L.W. 4467 (April 16, 1975) (No. 73-1742).

<sup>2</sup> 40 C.F.R. §§ 51.4, 51.6, 51.8 (1974).

<sup>3</sup> By letters of that date from Governor Sargent to EPA's Regional Administrator in Boston, John McGlennon.

<sup>4</sup> Dep't of Pub. Health, Bureau of Air Quality Control, Reg. 5.1.2.

however, that chapter 353 allowed the burning of high sulfur fuel at all times, with no control.<sup>5</sup> During periods of atmospheric inversion this could result in standards violations. EPA has not yet officially acted upon this revision. It had, however, previously denied, in part, a one-year variance granted by the Department of Public Health (DPH) to one of the largest residual oil users in the Berkshire AQCR, approving the variance only during the six summer months. This may give some indication that EPA will not approve chapter 353 in its entirety.

Chapter 494 requires the DPH to periodically review and revise the Massachusetts SIP to minimize the economic cost of its requirements, while still achieving and maintaining national air quality standards. The DPH is currently undertaking the required review and has prepared drafts of regulations raising the permitted sulfur content of fuel oil to 1% in metropolitan Boston and 2.2% elsewhere. The review dovetails with the requirement of the Energy Supply and Environmental Coordination Act of 1974<sup>6</sup> that EPA review all SIPs and report to the states whether the SIPs can be revised with respect to fuel burning sources without interfering with the attainment and maintenance of national standards. This process will almost certainly result in raising somewhat the permitted sulfur content of fuels. Chapter 494 would also require the DPH to defer the attainment of national standards for as long as permitted under the federal Clean Air Act. Further, it would require the DPH to correspondingly defer dates contained in regulations, compliance schedules, orders and other measures designed to achieve the standards upon petition from the owner or operator of an affected source. These requirements will in all probability have a minimal impact, since the attainment date for primary standards is established by the federal Act as May 31, 1975.<sup>7</sup> Chapter 494 further directs the DPH to allow sulfur oxide emission limitations to be met by tall stacks and fuel switching as well as by burning fuel with a low sulfur content. It should be noted that one court has ruled that EPA cannot approve a SIP containing tall stack

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<sup>5</sup> Acts of 1974, c. 353.

<sup>6</sup> Incorporated at 42 U.S.C. §§ 1857c-5(a)(3)(B) (1970).

<sup>7</sup> 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970) requires attainment of primary standards within 3 years of the approval of a SIP. The Massachusetts SIP was approved on May 31, 1972. 37 Fed. Reg. 10872 (1972). This date can be extended for an AQCR, but only for a period of two years, if requested by the Governor in submitting the original SIP and on a showing that achievement of the standard is impossible within the three year period because the technology is not available to key sources of air pollution in the AQCR. 42 U.S.C. § 1857c-5(e) (1970). Since the Governor made no such request in submitting the Massachusetts SIP and no technological deficiencies appear to be critical to attainment of primary standards in Massachusetts, the extension appears to be unavailable to it.

controls and that EPA, as a policy matter, supports constant emission limitations rather than fuel switching.<sup>8</sup> Tall stacks do not reduce polluting emissions but merely disperse them. Fuel switching schemes may be well calculated to avoid violating short term standards but jeopardize the attainment of annual average standards and are thought to be impossible to enforce with the resources available to control agencies. EPA has not taken final action with respect to this proposed revision and appears to be waiting to determine what implementing actions the DPH intends to take to effectuate its purpose.

Chapter 499 purported to exempt municipal incinerators operated by Weymouth, Winchester and Brookline from the requirements of the SIP. EPA has indicated that the revision is not approvable presently because the state has not supplied the documentation required to demonstrate compliance with EPA's substantive and procedural requirements for revision approval. More importantly, it indicated doubt that the revision could be approved even if the missing documentation were supplied. It noted that the three incinerators are significant sources of particulate emissions in an AQCR where the primary standards for particulates have not been achieved and where the SIP must be supplemented by further measures to maintain the standards once they are achieved. EPA indicated that the exemption of sources from a SIP in such an AQCR would be possible only if coupled with a corresponding addition of control over other sources not previously regulated or a corresponding increase in the controls over sources previously regulated.<sup>9</sup> Moreover, EPA subsequently issued a notice of violation to Weymouth in regard to the operation of its incinerator, the first step in EPA's enforcement procedures.<sup>10</sup>

The possible disapproval or partial disapproval by EPA of these Acts raises interesting questions of environmental federalism. EPA cannot repeal state statutes. But it can disapprove all or part of a SIP, and if it does so it must thereafter promulgate regulations to substitute for the disapproved portions of the SIP.<sup>11</sup> With regard to EPA's authority, the First Circuit has said:

We hold that these statutory provisions not only empower, but also require, the Administrator to disapprove state statutes and regulations, or portions thereof, which are not in accordance with

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<sup>8</sup> *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 6 E.R.C. 1248 (5th Cir. 1974), rev'd on other grounds, 43 U.S.L.W. 4467 (U.S., April 16, 1975) (No. 73-1742). *Current Developments, Environ. Rep.*, Dec. 6, 1974, at 1232; *Current Developments, Environ. Rep.*, Jan. 25, 1974, at 1583-84.

<sup>9</sup> Letter of EPA's Regional Administrator in Boston, John A. S. McGlennon, to Governor Sargent, Dec. 26, 1974.

<sup>10</sup> *Miller, Environmental Law*, 1972 *Ann. Surv. Mass. Law* § 21.6, at 597. See also 42 U.S.C. § 1857c-8 (1970).

<sup>11</sup> 42 U.S.C. §§ 1857c-5(a)(2), (c) (1970).

the requirements of the Clean Air Act. . . . Congress plainly intended the federal statute and regulations promulgated thereunder to take precedence over state laws and regulations. By enabling the Administrator to insert his own regulations in a state plan, it provided him with the needed authority to substitute appropriate provisions for inadequate ones. Thereafter, as equal components of the state plan, the Administrator's regulations may be both federally and locally enforced; violations thereof are violations of the state plan.<sup>12</sup>

Disapproval (or partial disapproval) by EPA of any of the Acts in question, however, would not appear to require it to promulgate substituting regulations. The Acts purport to modify the existing, EPA approved, SIP. Revisions to the SIP require EPA approval. If EPA disapproves the Acts as revisions, the SIP continues in effect unchanged, enforceable, under the First Circuit's rationale, both by EPA and the DPH. The Acts then would have been rendered meaningless by EPA.

In 1973 in *Natural Resources Defense Council, Inc. v. EPA*,<sup>13</sup> the First Circuit ordered EPA to disapprove the original Massachusetts SIP insofar as its variance provisions authorized the DPH to grant variances to SIP requirements extending beyond the statutory attainment dates. The court agreed with EPA's contention that variances were revisions to the SIP and therefore required EPA's approval before becoming effective. But it held that the DPH could not grant, and EPA could not approve, a variance that extended beyond the statutory attainment dates.<sup>14</sup> Such revisions could only be approved through the mechanism of 42 U.S.C. §1857c-5(f) (1970). As a practical matter this mechanism could only be available in a very limited number of cases for reasons discussed below.<sup>15</sup> The court left to EPA discretion whether to permit variances terminating prior to the attainment dates. It also allowed mechanisms for providing short term flexibility during the post-attainment period to allow for mechanical breakdowns, acts of God, etc.

EPA accordingly disapproved the Massachusetts variance provision

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<sup>12</sup> *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875, 888, 5 E.R.C. 1879, 1880 (1st Cir. 1973). Indeed, in discussing EPA's authority in the TCP area, the Third Circuit went so far as to indicate that EPA by its regulatory and enforcement powers could force a state to take positive legislative action to authorize, for instance, the state administration of an inspection and maintenance system to assure proper functioning of air pollution control devices on automobiles. *Pennsylvania v. EPA*, 500 F.2d 246, 6 E.R.C. 1769 (3d Cir. 1974).

<sup>13</sup> 478 F.2d 875, 5 E.R.C. 1879 (1st Cir. 1973). See Miller, *Environmental Law*, 1972 Ann. Surv. Mass. Law § 21.2, at 578; see § 18.14 n.6 supra.

<sup>14</sup> 478 F.2d 875, 5 E.R.C. 1879 (1st Cir. 1973).

<sup>15</sup> See text at note 27 infra.



and promulgated one in its place. Under EPA's regulation no variance to the requirements of the Massachusetts SIP can be granted unless it: (1) requires compliance as expeditiously as practicable but no later than the primary standard attainment dates if in an area where primary standards are still to be met; (2) requires compliance within a reasonable time but no later than the secondary standard attainment dates if in other areas; and (3) becomes effective only upon approval by EPA. EPA's approval is contingent upon public participation procedures having been met. The procedures allow post-attainment date variances only through the mechanism of 42 U.S.C. § 1857c-5(f) (1970) or for a maximum of three months where compliance is impossible because of breakdown or malfunction of equipment or act of God.<sup>16</sup>

In the period since the First Circuit handed down its decision on variances, several other circuits have considered the question. The Eighth and Second Circuits generally agree with the First Circuit.<sup>17</sup> The Fifth Circuit held that section 1857c-5(f) is the only mechanism for granting even pre-attainment date variances.<sup>18</sup> And the Ninth Circuit has rejected the pre-attainment and post-attainment distinction, holding that states can grant minor variances at any time without resort to section 1857c-5(f).<sup>19</sup> At the time of this writing, the Supreme Court had granted certiorari to resolve this disagreement between the circuits.<sup>20</sup> In the meantime, following the view of the majority of the circuits, EPA disapproved all state SIPs to the extent that they allowed variances beyond the statutory attainment dates and proposed regulations to cure this defect.<sup>21</sup> In the interest of promoting uniformity among the states, the proposed regulations would supersede EPA's previously promulgated variance regulation in Massachusetts. The proposed regulation would prohibit a state variance, order or other measure deferring compliance with a SIP requirement beyond a

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<sup>16</sup> 40 C.F.R. § 52.1131 (1974).

<sup>17</sup> *Natural Resources Defense Council, Inc. v. EPA*, 494 F.2d 1475, 6 E.R.C. 1475 (2d Cir. 1974); *Natural Resources Defense Council, Inc. v. EPA*, 473 F.2d 690, 5 E.R.C. 1917 (8th Cir. 1973).

<sup>18</sup> *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 6 E.R.C. 1248 (5th Cir. 1974), rev'd, 43 U.S.L.W. 4467 (U.S., April 16, 1975) (No. 73-1742).

<sup>19</sup> *Natural Resources Defense Council, Inc. v. EPA*, 507 F.2d 905, 7 E.R.C. 1181 (9th Cir. 1974).

<sup>20</sup> *Current Developments, Environ. Rep.*, Jan. 17, 1975, at 1430-31; *Current Developments, Environ. Rep.*, Jan. 10, 1975, at 1391-93. The Court recently reversed the Fifth Circuit case. *Train v. Natural Resources Defense Council, Inc.*, 43 U.S.L.W. 4467 (U.S., April 16, 1975) (No. 73-1742). The Court ruled that states may grant pre- and post-attainment variances without going through the procedures of 42 U.S.C. § 1857c-5(f). It suggests that states may grant variances without EPA approval if the result would not interfere with the attainment or maintenance of air quality standards. It is too early to predict the impact of this decision on the implementation of the Act or the SIPs.

<sup>21</sup> 39 Fed. Reg. 34572 (1974).

primary or secondary standard attainment date, except in conformity with actions taken pursuant to sections 1857c-5(e) or (f). EPA had not taken final action on this proposal as of the date this was written.

The requirement that EPA approve variances before they become effective has undoubtedly had a chilling effect on those seeking variances. DPH's regulations allow it to grant variances for no more than a year.<sup>22</sup> But the time required for EPA to approve a variance may consume most or all of that year.<sup>23</sup> This results in part from EPA's position that revision approval is a rule-making procedure and thus requires proposal in the *Federal Register*, public comment, and promulgation in the *Federal Register*. The greatest part of this delay, however, appears to result from the various levels of review required for approval in EPA's regional office, Washington headquarters, and the air pollution planning and standards facility in North Carolina.

A related problem for EPA, states and air pollution sources is the legal status of sources not yet in compliance with SIP requirements on the statutory attainment date, May 31, 1975 in most cases. It is probable that many sources will be in that position because of ignorance of relevant SIP requirements, failure of control agencies to expeditiously approve control equipment designs, delays in equipment delivery, non-existence of required technology, and, in some cases, recalcitrance. All sources not in compliance with SIP requirements on the attainment date, regardless of the reason for their non-compliance, would appear to be in the same uncomfortable position: subject to criminal fines of up to \$25,000 a day, imprisonment, and injunctive orders, including shut-down orders, that could result from suits initiated by aggrieved citizens as well as state and federal control agencies.<sup>24</sup> Control agencies seeking to strictly interpret and enforce the Act and the SIPs would cause significant economic disruption in an already unsettled economy. Control agencies not doing so would be criticized by environmental groups for not carrying out their statutory mandate. Yet the possible ways around the dilemma appear closed or uncertain at best. The easiest would be a two year deferral of the attainment date under 42 U.S.C. § 1857c-5(e) (1970). But, for

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<sup>22</sup> Dep't of Pub. Health, Bureau of Air Quality Control, Reg. 50.1.

<sup>23</sup> An example of this is a variance to two power plants to burn high-sulfur fuel, approved by EPA on May 9, 1974 and published on May 16, 1974. 39 Fed. Reg. 17442 (1974). The prologue recites that the variances were a result of correspondence from EPA to various governors on Oct. 15, 1973 urging expedited planning for the expected fuel shortage in the 1973-74 heating season. Among other measures EPA urged a comprehensive variance plan to assure that the low-sulfur fuel available was used in the areas of greatest need, i.e., areas with the highest SO levels. The DPH reacted quickly, granting the subject variances from Jan. 1, 1974 to May 15, 1974 and submitting them for EPA review on Nov. 21, 1973. Yet, despite the state's quick action at EPA urging, EPA did not approve the variances for six months, on May 9, 1974, just six days before the variances expired.

<sup>24</sup> 42 U.S.C. §§ 1857c-8(b) & (c), 1857h-2 (1970).

reasons noted above, this option is not available for the Massachusetts SIP.<sup>25</sup> Another option is the one year extension available to particular sources under 42 U.S.C. § 1857c-5(f). But this extension requires EPA to find that: (1) the source has made good faith efforts to comply with the SIP requirements by the attainment date; (2) the necessary technology was not available for the source to comply by the attainment date; (3) interim measures are available to reduce public health hazards; and (4) the continued operation of the source is essential to national security, public health or welfare.<sup>26</sup> Few sources would be able to meet these criteria. In addition, it is not clear whether such an extension could be renewed after one year. Moreover, EPA's findings must be made on the record after a formal EPA adjudicatory hearing, requiring a considerable amount of time and eliminating, as a practical matter, EPA's ability to deal with many sources in this manner with its limited resources.<sup>27</sup> EPA has, in fact, discouraged sources from pursuing this role.<sup>28</sup> As discussed above, states cannot revise their SIP requirements by regulatory changes or variances without going through one of these two procedures. And the First Circuit has indicated that states cannot issue administrative orders to sources with schedules that extend beyond the statutory compliance dates,<sup>29</sup> a position also suggested by EPA in its proposed regulations.<sup>30</sup> EPA has taken the position that it, however, can issue administrative orders that extend beyond the statutory compliance dates<sup>31</sup> and it has in fact done so in numerous instances.<sup>32</sup> This would appear to be contrary to the logic prohibiting the states from doing so, but the specific language in the Clean Air Act giving EPA enforcement authority allows it to issue orders requiring compliance within such time as it "deter-

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<sup>25</sup> See note 7 *supra*.

<sup>26</sup> 42 U.S.C. § 1857c-5(f) (1970).

<sup>27</sup> 42 U.S.C. § 1857c-5(f)(2)(A) (1970). See also EPA Office of General Counsel, Memorandum of Law entitled "One-Year Postponement Under § 110(F)," (June 12, 1973).

<sup>28</sup> EPA's Director of Stationary Source Enforcement, Richard Wilson, discouraged this approach in a meeting of the American Bar Association's Natural Resources Section on Nov. 7, 1974. His stance was challenged by the NRDC which contended that § 1857c-5(f) was the only manner provided in the Act for extending compliance dates. Its reaction was predictable since it is fighting EPA on the question in all circuits and four of the five circuits ruling on the question to date have agreed with the NRDC. See notes 17-20 *supra*; Current Developments, *Environ. Rep.*, Nov. 15, 1974, at 1130-31.

<sup>29</sup> *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875, 5 E.R.C. 1879 (1st Cir. 1973). Quere whether the court would review or affirm a state or lower court decision which had the effect of granting a source an extension beyond the statutory compliance date.

<sup>30</sup> See note 21 *supra* & accompanying text.

<sup>31</sup> Current Developments, *Environ. Rep.*, Nov. 15, 1974, at 1125.

<sup>32</sup> Conversations with EPA's Director of Stationary Source Enforcement, Richard Wilson.

mines is reasonable.”<sup>33</sup> While such an order would place a source on an implementation schedule and protect it from criminal prosecution under the Act as long as it remained in compliance with the order, it would not necessarily forestall a civil suit brought by a citizen under the Act to enforce the original SIP requirements.<sup>34</sup> The only clean way out of this dilemma is congressional action to provide a workable means of placing sources on compliance schedules during the post-attainment period and protecting them from further jeopardy as long as they remain in compliance with such schedules.<sup>35</sup>

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<sup>33</sup> 42 U.S.C. § 1857c-8(a)(4) (1970).

<sup>34</sup> Citizens are granted authority to seek civil relief against sources in violation of an “emission standard or limitation” under the Act. 42 U.S.C. § 1857h-2(a)(1) (1970). Emissions standards and limitations under the Act require compliance by all sources with SIP regulations by the statutory attainment dates. The only statutory avenues of extending those dates are 42 U.S.C. §§ 1857c-5(e), (f) (1970), discussed above. Thus, sources not in compliance with all applicable SIP regulations on the statutory attainment dates are in violation of such standards and limitations despite any EPA enforcement order. In fact, the existence of such an order would appear to establish such a violation. See Current Developments, Environ. Rep., Nov. 15, 1974, at 1130.

<sup>35</sup> Current Developments, Environ. Rep., Nov. 15, 1974, at 1130.